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Supreme Court, U.S.
FILED

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CASE NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

MICHAEL B. KING,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT'S JURISDICTION STATEMENT
(CORRECTED)

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153pgs

QUESTION PRESENTED

1.

The district court erred in denying appellant's motions to intervene as a matter of right in the declaratory action to determine whether the State of Georgia's senate redistricting map unlawfully diluted the voting strength of African-Americans in violation of section 5 of the 1965 Voting Rights Act.

2.

The district court erred in denying appellant's motion to stay the Section 5 declaratory proceedings pending a decision on appellant's renewed motion for leave to intervene.

3.

The district court erred in entering a decision on the merits of the State of Georgia's Section 5 declaratory action after notice of appeal of the order, denying the renewed motion to intervene, was filled.

4.

The district court erred in considering the State of Georgia's revised senate district map under Section 5 of the 1965 Voting Rights Act after notices of appeal of the orders and judgment, denying the renewed motion for leave to intervene and motion for reconsideration, were filed.

5.

The district court erred in holding that the State of Georgia's revised senate redistricting map did not dilute the voting strength of African Americans in violation of Section 5 of the 1965 Voting Rights Act.

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OPINIONS BELOW

The Order and Judgment denying appellant's motion for reconsideration of the motion for leave to intervene was entered on April 5, 2002 and is included herein as Appendix A. The order denying appellant's renewed motion to intervene was entered on January 30, 2002 and is included herein as Appendix B. The order denying appellant's motion for leave to intervene was entered on December 21, 2001 and is included herein as Appendix C.

STATEMENT OF JURISDICTION

This appeal arises from an Order and Judgment denying appellant's motions for leave to intervene in the State of Georgia's declaratory action brought under Section 5 of the 1965 Voting Rights. Act. Timely notices of appeal was filed on April 5, 2002 and February 7, 2002. This Court has jurisdiction over this appeal pursuant to Section 5 of the 1965 Voting Rights Act, 42 U.S. C. Section 1973c.

STATUTORY PROVISION INVOLVED

Section 5 of the 1965 Voting Rights Act,
42 U.S.C. Section 1973 provides:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4 (a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or Color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the

> qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Codes and any appeal shall lie to the Supreme Court.

STATEMENT OF CASE

1.

On October 10, 2001, the State of Georgia filed its declaratory action under section 5 of the 1965 Voting Rights Act, requesting the district court to enter a judgment that the state senate map did not have a discriminatory purpose or effect.

2.

The Attorney General, Ralph F. Boyd, Jr. and the United States of America filed a timely answer to the declaratory complaint.

3.

On December 19, 2001, appellant filed his motion for leave to intervene as a third-party defendant in the declaratory action.

4.

On December 21, 2001, the district court denied appellant's motion for leave to intervene because the court was unable to determine whether appellant's interests were adequately represented by the existing parties.

5.

On December 31, the defendants identified their position with respect to the appellee's redistricting map.

6.

On January 4, 2002, Jones, a second applicant for intervention, filed her

renewed motion to intervene. On January 10, 2002, the district court granted Jones' motion to intervene and required Jones to comply with the Court's initial scheduling and pretrial order. The district court did not serve appellant with a copy of the order granting Jones' motion to intervene. Appellant also had not been served with a copy of the scheduling order and Jones' motion to intervene.

7.

On January 15, 2002, appellant filed his renewed motion for application to intervene as a third-party defendant in the declaratory action.

8.

On January 15, 2002, the district court issued an order directing the parties to file responses to appellant's motion to intervene by no later than January 17, 2002. The plaintiff filed a timely response, opposing appellant's motion to intervene.

9.

On January 18, 2002, the district court faxed appellant a copy of the December 20, 2001 scheduling order per appellant's January 18, 2002 phone request. The scheduling order set a pretrial conference for parties on January 25, 2002. Appellant did not appear for the pretrial conference because the district court failed to serve him with notice that he was invited to appear at the conference.

10.

On January 30, 2002, the district court denied appellant's motion to intervene as a third-party defendant. The denial was based on appellant's absence from the January 25, 2002 pretrial conference. The court also stated that appellant's motion to intervene was untimely.

11.

On February 4, 2002, the district court began hearing evidence concerning the declaratory complaint.

12.

On February 5, 2002, appellant filed his notice of appeal of the order denying his renewed motion intervene by expressed mail. The notice was stamped filed on February 7, 2002. Appellant also filed his motion for reconsideration and motion to stay the hearings on the declaratory complaint.

13.

The district court proceeded with the evidentiary hearing and heard closing arguments on February 26, 2002.

14.

On April 5, 2002 the district court entered a final Order and Judgment on the declaratory complaint. In this Order, the court denied appellant's motion for reconsideration and motion to stay hearing. The court stated that the notice of appeal divested it of jurisdiction to consider the motions.

15.

In the April 5, 2002 Order and Judgment, the district court denied the plaintiff a declaratory judgment concerning the senate redistricting map.

16.

On April 17, 2002, appellant filed a notice of appeal of the final Order and Judgment.

17.

On April 8, 2002, the plaintiff requested the district court to amend its April 5, 2002 judgment for the purpose of retaining jurisdiction to consider a revised senate map. Appellant was not served with a copy of this motion.

18.

The defendants did not file a statement opposing the motion. Intervenor Jones filed a response, opposing the motion.

19.

On April 9, 2002, the district court modified its April 5, 2002 Order and Judgment and retained jurisdiction to consider the plaintiff's revised map.

20.

On April 17, 2002, the plaintiff filed the revised senate map. On April 18, 2002, the plaintiff filed a memorandum of law in support of the revised map. Appellant was not served with a copy of the revised map and memorandum.

21.

The defendant did not oppose the revised senate map. Intervenor Jones argued that the plaintiff did not meet its burden under Section 5 concerning the revised map.

22.

At the April 18, 2002 status hearing, the plaintiff and intervenor argued that the evidentiary record developed during the

February 4, 2002 hearing supported their positions. The plaintiff and intervenor agreed to a stipulated trial on the record.

23.

The court treated the plaintiff's submission of the revised senate redistricting map as a new complaint for declaratory judgment. The court did not provide appellant with notice of this action.

24.

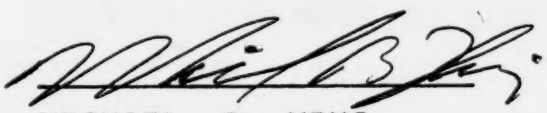
On June 3, 2002, the district court granted the plaintiff declaratory judgment on the "new" complaint. The court concluded that the revised senate map did not have the purpose and will not have the effect of denying or abridging the right to vote on account of race.

CONCLUSION

This Court has jurisdiction to consider this appeal and reverse and vacate the district court's Orders and Judgment, denying appellant's motion for leave to intervene as a third-party defendant.

This 17th day of June 2002.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 01-2111 (EGS HTE LFO)
THREE-JUDGE COURT

Filed April 5 2002

THE STATE OF GEORGIA,
Plaintiff,

versus

JOHN ASHCROFT, et al.,
Defendants.

Before: EDWARDS, Circuit Judge,
SULLIVAN, District Judge, and
OBERDORFER, Senior District Judge.

Opinion for the court filed by District Judge Sullivan, in which Circuit Judge Edwards joins, and in which Senior District

Judge Oberdorfer joins in Parts III.C.2. and III.C.3. Concurring opinion filed by Circuit Judge Edwards, in which District Judge Sullivan joins. Opinion concurring in part and dissenting in part filed by Senior District Judge Oberdorfer.

Sullivan, District Judge:

This is an action for declaratory judgment commenced by the State of Georgia under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1994) ("Section 5"). The State seeks a declaratory judgment that the redistricting plans passed by the Georgia General Assembly for the United States Congressional seats and the State Senate and House seats do not "have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973c.

The Voting Rights Act imposes weighty obligations on jurisdictions with a history

of racial discrimination in their electoral processes.[1] Congress enacted the Act with the "firm intent[] to rid the country of racial discrimination in voting" by a "complex scheme of stringent remedies." South Carolina v. Katzenback, 383 U.S. 301, 315, 86 S. Ct. 803, 812 (1966). The Georgia General Assembly is well aware of its statutory and constitutional responsibilities, as the State has spent much of the last decade defending its legislative reapportionment plans against claims of racial gerrymandering, brought pursuant to Section 2 of the Voting Rights and the United States Constitution. *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925 (1997) (affirming court-ordered Congressional redistricting plan); *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475 (1995) (holding that Congressional redistricting plan violated equal protection clause).

The State's obligations under Section 5, however, differ significantly from those

under Section 2 of the Voting Rights Act.[2]

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[1] Covered jurisdictions are determined by Section 4 of the Act, 42 U.S.C. § 1973b(b) (2001), and include states where voter participation was below 50% in 1964, and where a test or device was used to determine eligibility to vote in that year. Id. Georgia is a covered jurisdiction. 28 C.F.R. § 51, App. (Mar. 5, 2002).

[2] Section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).

Section 5 requires specific jurisdictions to comply with "preclearance" procedures before implementing any new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."[3] 42 U.S.C. § 1973c. Two avenues for preclearance are provided by the Act. Id. The covered jurisdiction may seek a declaratory judgment from a three-judge District Court for the District of Columbia that the new practice does not have the purpose or effect of denying or abridging

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[3] Section 5 provides:

> Whenever a State or political subdivision With respect to which the prohibitions set forth in section 4(a) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the

purpose and will not have the effect of denying or abridging the right to vote on account or race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

42 U.S.C 1973c (1994).

the right to vote on account of race or color. Id. In the alternative, the jurisdiction may submit its proposed procedures to the Attorney General for approval; the procedures are deemed approved if, after 60 days following the filing of a completed submission, the Attorney General has not raised any objections to the proposed procedures. Id.

The Supreme Court has characterized Section 5 as "an unusual, and in some aspects a severe, procedure for insuring that states would not discriminate on the basis of race in the enforcement of their voting laws." *Allen v. State Board of Elections*, 393 U.S. 544, 556, 89 S. Ct. 817 (1969). Section 5 was intended to provide an efficient and rapid mechanism for preclearing changes in voting procedures, while expressly providing that such preclearance in no way affects the ability of individuals to challenge that plan on other grounds. Id. at 549, 556.

Section 5 prohibits States from diminishing the opportunities of African American voters to exercise their electoral power. *Beer v. United States*, 425 U.S. 130, 141, 96 S. Ct. 1357, 1364 (1976). Georgia has demonstrated that African American voters increasingly have been able to make their voices heard at the ballot. The record indicates, however, that there are areas within the State where racially polarized voting persists. In these areas, white voters consistently vote against the preferred candidates of African Americans in local and district elections, so the strength of African American votes rests in substantial part on the sheer numbers of African American voters in a district. Where there is evidence of racially polarized voting, a redistricting plan that reduces African American votes in a district with no offsetting gains elsewhere raises the specter of impermissible retrogression. In this situation, the State is hard-pressed to demonstrate that there has been no "backsliding" in African American voting

strength. *Reno v. Bossier Parris School Bd.*, 528 U.S. 320, 335, 120 S. Ct. 866 ("Bossier II"). And such a failure is fatal in a Section 5 case, because the burden is on the State to show that the redistricting plan will not adversely affect the opportunities of African American voters to effectively exercise their electoral franchise. *Beer*, 425 U.S. at 141.

After carefully reviewing the evidence in the record before us, we hereby grant a declaratory judgment that the United States Congressional redistricting plan, Act No. 2EX11, and the State House redistricting plan, Act No. 2EX23, satisfy the requirements of Section 5. We hold, however, that the State of Georgia has not met its burden of proof under Section 5 with regard to the State Senate redistricting plan. The State has not demonstrated by a preponderance of the evidence that the State Senate redistricting plan does not have the purpose and will not have the effect of

denying or abridging the right to vote on account of race or color. Accordingly, the State's request for a declaratory judgment that the State Senate plan meets the requirements of Section 5 is denied.

I. Procedural History and Preliminary Matters

In this case, the State has foregone the Option of applying to the Attorney General for preclearance of its redistricting plans, and ~~a~~has filed suit in this court. Section 5 essentially freezes the existing districting plans in Georgia unless and until a declaratory judgment is obtained from this court that the proposed reapportionment plans are without discriminatory purpose or effect. *Reno v. Bossier Parris School Bd.*, 520 U.S. 471, 477,117 S. Ct. 1491 (1997) ("*Bossier I*"). The State of Georgia filed suit on October 10, 2001, requesting that the court enter a declaratory judgment that the Congressional, State House and State Senate plans do not have a discriminatory purpose or effect. Georgia's general primary is

scheduled for July 16, 2002, and the State has recently received preclearance to allow candidates for Congress and the state legislature to qualify for the primary from June 10 to June 21, 2002. *See* Defs.' Opp'n to Mot. For Expedited Trial at 6 (discussing November 26, 2001 preclearance of Georgia Act 2EX 10 (2001). In light of the "extraordinary" remedy mandated by the voting Rights Act, the court has acted with all possible speed to expeditiously resolve this matter. *Allen*, 393 U.S. at 563.

The court's scheduling order set a demanding briefing schedule, while permitting the parties to engage in extensive discovery up until the commencement of the trial was deferred for three days to enable the parties to complete discovery.

At the time of the initial scheduling conference, the United States had not yet identified its position with respect to each of the submitted plans. Upon consideration of a motion by the State of Georgia, a

response thereto and oral argument at the scheduling conference, the court required the United States to identify its legal position by no later than December 31, 2001.

Two motions to intervene were filed early in the proceedings, one by four African American citizens of Georgia, Patrick Jones, Roielle Tyra, Della Steele and Georgia Benton ("Jones"), and one by Michael King, an African American lawyer and resident of Senate District 44. Both motions were denied without prejudice following the court's order that the United States identify its legal position. Order, Civil Action No. 01-2111, December 20, 2001; Order, Civil Action No. 01-2111, December 21, 2001. The court invited the movants to file *amicus curiae* briefs, but held that, without clarification of the United States' legal position, it could not be determine if the existing parties adequately represented the interests of the putative intervenors. *See* Fed. R. Civ. P. 24(a).

On December 31, 2001, the United States identified its position with respect to the proposed redistricting plans. On January 4, 2002, Jones filed a renewed motion to intervene. After receiving a response and reply to this motion, on January 10, 2002, the court granted Jones' motion to intervene and required the intervenors to comply with the Court's initial scheduling and pretrial order. *See* Order, Civil Action No. 01-2111, January 10, 2002 (granting intervention as to State House and State Senate plans); Order, Civil Action No. 01-2111, January 30, 2002 (granting intervention as to Congressional redistricting plans). As discussed below, Mr. King renewed his motion to intervene in an untimely fashion, and was denied leave to intervene.

With the consent of the parties, Judge Sullivan resided over the four-day trial.[4] Following the conclusion of the trial, the parties submitted proposed findings of fact and conclusions of law, and post-trial memoranda of law. Closing arguments were heard by the three-judge panel on February 26, 2002.

There are several preliminary matters that the court must address before focusing on the three reapportionment plans. Pending before the court are: (1) a motion for leave to file an *amicus curiae* brief submitted by the American Civil Liberties Union ("ACLU"); (2) plaintiff's motion to strike the Jones intervenors for lack of standing;

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[4] The bulk of testimony in this case was submitted on paper, in accordance with the court's scheduling order and with the consent of the parties. While the court's order directed only that direct testimony be submitted in writing, the parties were permitted to witnesses at trial. The live testimony at trial, therefore, consisted of cross-examination and redirect questioning of the parties' expert witnesses.

(3) Mr.King's motion to stray proceedings and motion for reconsideration of his motion to intervene; and (4) defendants' and intervenors' motions to exclude portions of plaintiff's expert testimony.

A. ACLU's Motion for Leave to Participate as *Amicus Curiae*

The ACLU has moved the court for leave to participate as *amicus curiae* in this case in support of defendants' position that the Senate Plan is retrogressive. The court is of the opinion that the limitations on *amicus* filings outlined by the Seventh Circuit in *National organization for Women v. Scheidler*, 223 F.3d 615 (7th Cir. 2000), are applicable here. The ACLU has presented no unique information or perspective that can assist the court in this matter, and seeks only to make additional legal arguments on behalf of the United States, a more than adequately represented party. Accordingly, the court denies the ACLU's motion for leave to file an *amicus curiae* brief.

B. Standing for Jones Intervenors

The State of Georgia has challenged intervenors' standing to contest the reapportionment plans. In the context of a Section 2 challenge, the Supreme Court has stated that "[w]here a plaintiff resides in a racially gerrymandered district, . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action." United States v. Hays, 515 U.S. 737, 744-45, 115 S. Ct. 2431 (1995).

The State argues that two of the four individual intervenors reside in a benchmark Senate District disputed by the parties, but would be removed from this District under the Senate redistricting plan. Nevertheless, whether intervenors reside in the proposed or benchmark districts at issue in this matter does not affect their standing for purposes of challenging the redistricting plans as retrogressive. The plans are statewide and the drawing of one district's boundaries

necessarily affects neighboring districts. Furthermore, the removal of intervenors from a majority-minority district is sufficient to provide intervenors with standing to challenge the proposed district.

The State also raises concerns that intervenors' interests in the litigation may diverge from the statements of councel. Two of the intervenors appeared to testify at their depositions that they would prefer to reside in a majority-white, Republican district. This conflicts with their counsel's representations that intervenors are harmed by a decrease in overall minority voting strength caused by reduction of minority population in the districts. However, we are reluctant to strike intervenors solely on the basis of this alleged contradiction. Intervenors' sworn declarations clearly allege an injury caused by diminution of minority voting strength. Deposition testimony may cast doubt on the extent of that injury, but it does not eliminate intervenors' standing.

C. King Motion for Reconsideration of Motion to Intervene

Pending before the court are two motions Filed by putative intervenor, Michael B. King. King is an African American attorney and registered voter who resides in Georgia Senate District 44. King is proceeding pro se and first sought to intervene on December 19, 2001.[5] On December 21, 2001, King's motion was denied without prejudice because the United States had not yet identified its position with respect to the redistricting plans in question and the court was unable to determine

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[5] The court is acutely aware of its responsibilities to pro se litigants. See, e.g., Fox v. Strickland, 837 F. 2d 507 (D.C. Cir. 1998) (requiring courts to inform pro se plaintiffs of standard of review for summary judgment motions). Despite the fact that Mr. King is an attorney, this court has taken care to ensure that king was aware of the progress of this case.

The court contacted King upon receipt of his motion to intervene and directed him to file his motion in accordance with the local rule governing three-judge courts, which requires that parties file all pleadings in quadruplicate. See Local Civil Rule 9.1.

whether King's interests would be adequately represented by the existing parties. See Fed. R. Civ. P. 24(a). However, King was granted permission to file an *amicus curiae* brief by no later than January 14,2002.[6] Chambers manually faxed King a copy of the court's December 21, 2001 order.[7]

An initial scheduling and pretrial order in this matter was issued on December 20, 2001. This order set forth a series of deadlines designed to expedite trial proceedings. In particular, the order required defendants to identify their position with respect to the redistricting plans by no later than December 31, 2001.

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[6] To date, King not filed or attempted to file an *amicus curiae* brief.

[7] Chambers faxed King a copy of the order because at no point did King subscribe to the court's automatic faxing program, which allows parties to automatically receive facsimile copies of court orders at the time they are docketed. Counsel for the plaintiff, federal defendants and intervenors all participate in the Court's automatic faxing program and receive facsimile copies of all orders docketed in this case.

Chambers manually faxed a copy of the initial scheduling and pretrial order to King, in light of the expedited nature of the proceedings, King's failure to subscribe to the automated faxing program of the Clerk's office and his representation to chambers' staff that he had not viewed the filings in this case.

On January 15, 2002, King filed a renewed motion to intervene. On January 16, 2002, this court issued a scheduling order directing the parties to file any and all responses to King's motion by no later than January 17, 2002 at noon, and ordering that any and all replies be filed by not later that January 18,2002 at noon. Also on January 16, 2002, chambers contacted the parties in this matter and attempted to contact King in order to inform them of the contents of the court's order. Counsel for the parties indicated that they had not received a copy of King's renewed motion to intervene. King's telephone answering system was full on January 16 and on the following

two days. In light of these circumstances, chambers faxed a copy the scheduling order to King on January 16,2002, and faxed a copy of King's renewed motion to intervene. King's telephone answering system was full on January 16 and on the following two days. In light these circumstances, chambers faxed a copy of the scheduling order to King on January 16, 2002, and faxed a copy of Kings renewed motion to plaintiff's counsel for distribution to all parties.[8]

On the evening of January 18, 2002, King contacted chambers and stated that he had

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[8] Footnote 1 of Plantiff's Memorandum of Points and Authorities in Opposition to King's Renewed Motion to Intervene, filed January 17, 2002, reflects these events:
Although Mr. King's Certificate of Service indicates he mailed his "Renewed Motion to Intervene" by mail to only two of the attorneys (only D.C. counsel and no Atlanta counsel) in this case on January 14, 2002, the undersigned counsel represents that as of the close of business on January 16,2002, *none* of the counsel in this case received Mr. King's papers. The undersigned obtained a copy of Mr. King's papers. The undersigned obtained a copy of Mr. King'

received the facsimile copy of the January 16, 2002 order. He noted that the deadline for his submission had passed and indicated that he had just received the order. At no future date did King file any reply to the parties' responses to his motion to intervene.

As is evident from our initial scheduling and pretrial order, this matter was scheduled to proceed to trial on February 1, 2002. Pretrial statements, expert reports And direct testimony were all filed by January 18, 2002, and the pretrial conference was scheduled for January 25, 2002. On January 23, 2002, the court issued an order rescheduling the pretrial conference from 10:00 a.m. to 12:00 p.m. on January 25, 2002, and faxed King a copy of this order. King did not appear at the pretrial conference, nor did he communicate in any way with chambers concerning the expedited schedule for this matter. On January 30, 2002, this court denied King's motion to intervene without prejudice. This denial was based on

King's "failure to appear at the January 25, 2002 pretrial conference, of which he had notice, his consistent failure to communicate with Chambers and with counsel for the parties in this matter, and the expedited nature of these proceedings." Order, Civil Action No. 01-2111, January 30, 2002.

King sought to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a). However, any application for intervention must be timely. *See National Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 93 S. Ct. 2591 (1973) ("NAACP). In NAACP, the Supreme Court discussed the legal standard for considering the timeliness of a motion to intervene in an action for declaratory judgment brought pursuant to Section 4(a) of the Voting Rights Act. 413 U.S. at 365-66. The Court held that the three-judge court properly exercised its discretion in determining from all of the circumstances that a motion to intervene was untimely. Id. ("Although the point to which the suit has progressed is one factor in the

determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances."). King "failed to protect [his] interest in a timely fashion" by repeatedly failing to communicate with the court, to keep apprized of the case and to comply with local filing requirements. *Id.* at 367. King knew or should have known that the proceedings were subject to expedited review.

King's legal interest has not been adversely affected by the Court's denial of his motion to intervene. *Id.* at 368 (considering ability of movant to take future action to protect interests). This court's denial of King's motion to intervene in no way forecloses his ability to challenge Georgia's senate reapportionment plan. We have consistently stressed the expedited nature of our review of this matter. In denying King's renewed motion to intervene, the court was mindful of the fact that King's failure to act in a timely matter had the potential for seriously disrupting the

State's electoral process." *Id.* at 369 (discussing Section 4 proceedings).

On February 7, 2002, King filed a motion to stay proceedings in this court, a motion for reconsideration of his motion to intervene, and a notice of appeal to the Supreme Court. The motion for a stay referred to a "January 4, 2002 hearing," which King moved to stay pending the court's consideration of his motion for reconsideration and his appeal. No hearing was scheduled in this matter on January 4, 2002. The court commenced trial in this case on February 4, 2002 and it is possible that King intended to request a stay of the trial. Nevertheless, the motion was filed on February 7, 2002, the last day of the four-day trial.

Plaintiff argues that, upon receipt of the notice of appeal, this court lost jurisdiction to consider King's motions. We agree. The Supreme Court has provided clear direction as to how to proceed when a defendant simultaneously files a notice of appeal with the appellate court and a motion for reconsideration with the district court.

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the [appellate court] and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 103 S. Ct. 400 (1982); *accord United States v. DeFries*, 129 F. 3d 1293 (D.C. Cir. 1997). While it is clear to the court that King's renewed motion to intervene and motion to stay are as untimely as his previous motion, King's notice of appeal divested this court or jurisdiction to consider King's motions.

D. Motion to Exclude Dr. Epstein's Testimony

The United States and intervenors seek to exclude the testimony of the State's expert, Dr. David Epstein, regarding his analysis of white crossover voting in the benchmark Senate Districts, *see* U.S. Ex. 122, and his conclusion that it was proper to

assess voting trends on a statewide, rather than a regional basis. Although the testimony was provided at the eleventh hour to the United States, the United States was able to cross-examine Epstein with respect to his analysis. The cross-examination of Epstein effectively highlighted problems with Epstein's conclusion that there was no statistically significant variation in the degree of white crossover. Furthermore, the court offered the United States an opportunity to re-open cross-examination in order to permit the United States' expert to assist counsel in the cross-examination. The United States declined this opportunity. The court finds that the introduction of Epstein's calculations of white crossover voting are not unduly prejudicial. Epstein relies on the table in question only for the limited conclusion that a statewide probit analysis was proper; neither he nor the State suggest that the table is reliable evidence of white crossover voting in the Senate Districts.

Intervenors urge this court to strike Epstein's testimony on the basis that it is not competent expert testimony. They argue That Epstein's probit analysis does no represent reliable or relevant evidence. However, Epstein testified that probit analysis is a standard statistical methodology. The court finds that Epstein's report is reliable and relevant evidence.

II. Findings of Fact

At first glance, the evidentiary record in this matter appears extensive. Yet, considering that the State has chosen to present three statewide reapportionment plans to the court, the record in fact is rather slim. The State of Georgia, the United States and intervenors have all contributed to the evidentiary record before the court. The State introduced statistical data on the existing and proposed districts, including political performance, total population and voting age populations, as well as break-downs of that data by race. The State relied

on the testimony of two expert witnesses, State legislators, United States Representative John Lewis from Georgia, and the director of the redistricting office in Georgia, Linda Meggers. In response, the United States presented the court with a greater amount of and more detailed evidence, including voter registration data, precinct-level information, data and maps demonstrating exactly how district lines would be redrawn by the proposed plans, and testimony of numerous social leaders and local elected officials from the contested districts. The United States also provided the only expert report that considered the

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III Conclusions of Law

The court has jurisdiction to hear this case pursuant to 42 U.S.C. § 1973c; 28 U.S.C. § 1346(a) (2); 28 U.S.C. § 2201. This court

is properly convened as a three-judge court pursuant to 42 U.S.C. § 1973c and 28 U.S.C. § 2284. None of the parties contests the applicability of Section 5 to this matter.

The State of Georgia is a covered jurisdiction as defined under Section 5 of the Voting Rights Act of 1965, as amended. 42 U.S.C. § 1973c and 28 C.F.R. § 51 (Appendix). Section 5 applies to any changes in voting processes in Georgia, and mandates that the State receive preclearance prior to instituting any such changes. *Georgia v. United States*, 411 U.S. 526, 527-28. 93 S. Ct. 1702 (1973). The reapportionment of seats in Georgia's Congressional delegation and General Assembly seats for the House and Senate are changes in voting procedures covered by the Voting Rights Act and require preclearance.

In an action for declaratory judgment pursuant to Section 5, the plaintiff has the burden of proving by a preponderance of the

evidence the absence of both discriminatory effect and discriminatory purpose in the reapportionment of its legislative districts. *City of Pleasant Grove v. United States*, 479 U.S.462, 469, 107 S. Ct. 794 (1987).

A. Court's Obligations in Action for Declaratory Judgment

The State of Georgia made the strategic decision to institute an action in this court for declaratory judgment and not to seek administrative preclearance from the Department of Justice. The vast majority of changes in voting procedures subject to Section 5 are submitted to the Department of Justice for preclearance. The majority of cases that come to this court represent plans or changes to which the Department of Justice has objected. Here, Georgia's redistricting plans have been submitted in the first instance to this court for review.

When the plans were submitted for judicial review. Georgia did not know whether the Attorney General would object to the

plans and, if he did, which plans and which districts would be considered problematic. The Attorney General eventually identified only the Senate redistricting plan as objectionable, and, in particular, proposed Senate Districts 2,12 and 26.

This case presents a unique circumstance wherein the Attorney General has not objected to two of the three redistricting plans proposed by the State of Georgia, and yet the State has come to this court seeking judicial- and not administrative-preclearance of all three plans. The United States and intervenors argue that the United States' failure to object to the two plans does not justify entry of declaratory judgment because the State retains the burden of proof and because the objections of intervenors preclude entry of a declaratory judgment. The State argues that the failure of the United States to object to the Congressional redistricting plan and the State House plan relieves this court of any

obligation to make findings with respect to those plans. The court does not agree. The State chose not to seek administrative preclearance. In asking this court to enter a declaratory judgment as to all three plans, it imposes on this court an affirmative duty to inquire whether the plans have the effect or purpose of denying or abridging the right to vote on account of race or color. Furthermore, the State assumes the burden of demonstrating by a preponderance of the evidence that such a declaratory judgment is warranted.

Plaintiff cites *Morris v. Gressette* as evidence that Congress intended that courts review requests for declaratory judgment only where the Attorney General objects to such an entry of judgment. 432 U.S. 432, 97 S. Ct. 2411 (1977). In *Morris*, the Supreme Court characterized the difference between the preclearance avenues as one based on the distinction between affirmative action and silent acquiescence by the Attorney General:

> This [administrative preclearance] method of compliance under § 5 is unlike the [declaratory judgment preclearance method] in that implementation of changes in voting laws is not conditioned on an affirmative statement by the Attorney General that the change is without discriminatory purpose or effect. To the contrary, compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the Attorney General.

Id. at 502. Yet, Section 5 clearly presents two different methods of preclearance. The State cannot point to the Attorney General's apparent acquiescence - a circumstance relevant under the statue when administrative preclearance is sought - to justify a grant of judicial preclearance. Had the Attorney General administratively precleared the United States Congressional redistricting plan and State House redistricting plan, the current matter may well have been mooted. *See City of Dallas v United States*, 482 F. Supp. 183 (D.D.C. 1980) (three-judge court) (holding that Section 5 did not provide a forum for intervenors to challenge a voting

plan after the Attorney General had approved a revised voting plan).

However, the idea that Congress intended this three-judge court to be a rubber stamp is simply untenable. *In City of Richmond v. United States*, the Supreme Court reviewed a decision of this court that had engaged in a Section 5 inquiry where the United States and the City of Richmond had entered a consent decree, but citizen intervenors objected to the entry of the consent decree. 422 U.S. 358, 366, 95 S. Ct. 2296 (1975). If the State were correct that this Court's jurisdiction is stripped when the United States fails to object to a plan submitted for judicial preclearance, the three-judge court in *City of Richmond* would have been without jurisdiction to consider intervenors' claim. While the Supreme Court's decision does not comment on this issue, neither did the Court question the district court's exercise of jurisdiction and, in fact, remanded the case to the district court for

further proceedings. *Id.* at 378. Similarly, we reject the State's argument that this court's review is limited only to those districts challenged by the United States, and should not encompass the redistricting plans in their entirety. In a declaratory judgment action brought pursuant to Section 5, the court's review necessarily extends to the entire proposed plan. Refusing to preclear only the specific districts to which defendants object would nevertheless require the State to rework its entire Senate plan. Moreover, Georgia has presented no legal authority that would limit the Section5 inquiry to those district challenged by the Attorney General as retrogressive. Indeed, the very structure of the declaratory judgment procedure, under which the court, and not the Attorney General, is vested with the final authority to approve or disapprove the proposed change as a whole, argues conclusively against the State's suggestion.

B Legal Standard for Assessing Retrogressive Effect

The legal standard for reviewing redistricting plans submitted for Section 5 preclearance has been defined in a deceptively simple manner. In *Beer*, the Supreme Court held that a reapportionment plan must not "lead to a retrogression in the positon of racial minorities with respect to their effective exercise of the electorial franchise." *Beer*, 425 U.S. at 141. In other words, the new apportionment plan must not have the effect or purpose of providing minority voters with less opportunity to elect candidates of choice than did the previous plan. *Id.*

All parties in this action make liberal use of the word "retrogression" in their arguments, by shy away from any attempt to define retrogression. The court can not so easily avoid this task.

Section 5 does not focus on the discriminatory impact of a plan, an inquiry which would measure the plan against an ideal, non-discriminatory plan. *See Bossier II*, 528 U.S. at 328; cf. City of Lockhart v. United Stated, 460 U.S. 125, 134,103 S. Ct. 998 (1983) (finding that a change that did "not increase the degree of

discrimination against Blacks…[was] entitled to § 5 preclearance"). Rather than an objective ideal, the Supreme Court has explained that retrogression is to be measured with respect to the status quo, reflecting Congress' intent to "freeze" the existing procedures if a proposed change would retrogress. *Bossier I*, 520 U.S. at 477. Preclearance must be denied if a proposed change "'abridges the right to vote' relative to the status quo." *Bossier II*, 528 U.S. at 334; *see Holder v. Hall*, 512 U.S. 874, 883-84, 114 S. Ct. 2581 (1994) ("The baseline for comparison is present by definition; it is the existing status."); *City of Lockhart v. United States*, 460 U.S. 125, 132-33, 103 S. Ct. 998 (1983) (proper comparison is between new system and system actually in effect prior to adoption of new charter, regardless of what state law might have required); *Texas v. United States*, 785 F. Supp. 201, 203 (D.D.C. 1992) (preclearance involves a compatative inquiry into whether the change in voting procedures is retrogressive when compared with the plan that would otherwise be in force and effect). In the context of a vote-dilution claim, the Court has held that

preclearance, which rests on a finding of non-retrogression, "is nothing more than a determination that the voting change is no more dilutive than what it replaces." *Bossier II*, 528 U.S. at 335.

The Supreme Court has never comprehensively defined "retrogression," nor has it engaged in any detailed discussion of what constitutes an "effective exercise of the electoral franchise" by minority voters. But *see Holder v. Hall*, 512 U.S. 874, 895-903 (Thomas, J. concurring) (stating that the Court has tacitly selected the number of elected officials as its indicator of electoral strength). Section 5 cases have focused almost exclusively on evaluating whether a proposed change would leave minority voters in a "worse" position that under the existing plan. *See Bossier I*, 520 U.S. at 487. The Court has clearly held that compliance with Section 5, and avoidance of retrogression, does not require jurisdictions to improve or strengthen the voting power of minorities. *Bush v. Vera*, 517 U.S. 952, 983, 116 S. Ct. 1941 (1966). Nor does Section 5 require that redistricting plans ensure victory for minority preferred candidates. Rather, it is

a mandate that "the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the States actions." *Bush*, 517 U.S. at 983 (emphasis added); accord *Hale County v. United States*, 496 F. Supp. 1206, 1216 (D.D.C. 1980) (principle of nonretrogression requires that covered jurisdiction demonstrate that minority voters maintain "at least as much electoral power as they possessed under" the existing system, and that proposed change will not result in a "retreat from the potential advantage previously held by Black voters…") (emphasis added).

While slightly more detailed definitions of retrogression are found in decisions by three-judge panels of this court, they simply extend the underlying rationale that preclearance must be withheld from a plan that would diminish minority voting strength - directly or indirectly. In *Texas v. United States*, the court explained that "[t]his rule mandates that preclearance be denied under the 'effects' prong of Section 5 if a new system places minority voters in a weaker position than the existing system." 866 F. Supp. 20 27 (D.D.C. 1994);

accord *Arizona v. Reno*, 887 F. Supp. 318, 320 (D.D.C. 1995) (any change which would place a protected minority group in a position worse than its position [under the benchmark plan] does not merit clearance"); *New York v. United States*, 874 F. Supp. 394, 397 (D.D.C. 1994) ("[i]f the position of minority voters is not worse under the new scheme than it was under the old scheme, then the proposed change is entitled to preclearance under section 5").

While courts have frequently considered the number of "majority-minority" districts as indicative of minority voting strength, the parties in this matter apparently agree that Section 5 is not an absolute mandate for maintenance of such districts. This agreement is entirely proper. It is true that in *United Jewish Organizations of Williamsburgh, Inc, v. Carey*, a plurality of the Supreme Court construed the retrogression standard to mean that "had there been districts with Black majorities under the previous law, and had [the covered jurisdiction] in fact decreased the number of majority Black districts, it would have had to modify its plan in order to implement its

reapportionment by carving out a large enough Black majority in however many additional districts would be necessary to satisfy the *Beer* Test." 430 U.S. 144, 159-60, 97 S. Ct. 996 (1977) (White, J., joined by Stevens, Brennan, and Blackmun, JJ.); accord Ketchum v. Byrne, 740 F. 2d 1398, 1402 n.2 (7th Cir. 1984) (defining "retrogression" as "a decease in the new districting plan or other voting scheme in the absolute number of representatives which a minority group has a fair chance to elect"). This statement in *United Jewish Organizations*, however, was pure dicta: the plurality's holding was simply that Section 5 authorizes some consideration of race in drawing district lines. 430 U.S. at 161. Moreover, the Court's subsequent cases have analyzed the issue of the creation and maintenance of majority-minority districts in the broader context of assessing minority voting strength in a given jurisdiction.

Indeed, in the context of Section 2 cases, the Court has observed that majority-minority districts do not inherently increase

or decrease minority voting strength, but rather can have "either effect or neither." *Voinovich v. Quilter*, 507 U.S. 146, 154-55, 113 S. Ct. 1149 (1993). Breaking apart a majority-minority district and dispersing minority voters into neighboring districts can have different consequences in different contexts. On the one hand, it can diminish minority voters' power by "fragmenting [them] among several districts where a bloc-voting majority can routinely outvote them." *De Grandy*, 512 U.S. at 1007. On the other hand, such dispersal can actually increase electoral opportunity if it eliminates "packing" whereby the minority voters are crammed into a small number of "safe" districts and deprived of an ability to influence a greater number of elections. Id.; cf. Holder v. Hall, 512 U.S. 874, 898-903 (1994) (Thomas, J., concurring) (suggesting that Section 2 case law is inconsistent because some courts emphasize the need for majority-minority district to equalize voting power while others have found

that such districts have the effect of isolating minority voters and limiting their electoral strength).

Thus, in an area where voting patterns are not polarized according to race, distributing African American voters out of a single district in which they were a majority and creating substantial minorities in a larger number of districts may increase the voters' ability to elect candidates of choice. *See Hayes v. Louisiana,* 936 F. Supp. 360, 364 n.17 (W.D. La. 1996) (noting that one plan "with its one Black majority and three influence districts, empowers more Black voters statewide than does" a plan with two Black-majority districts and five "bleached" districts in which minority influence was reduced in order to create the second Black-majority district); cf. *Shaw v. Hunt,* 517 U.S. 899, 947 n.21 (1996) (Stevens, J., dissenting) ("Of course, a State that unfairly 'packs' African-American voters into a limited number of districts may be subject to a § 2

challenge on the ground that it has failed to create so-called 'influence districts'…"). As such, the Court has suggested that the propriety - and even the legality - of majority-minority districts depends on a careful analysis of the facts and circumstances surrounding their use, and particularly of the nature of "society's racial and ethnic cleavages." *De Grandy*, 512 U.S. at 1020. Therefore, in asking whether the elimination of a majority- minority district - or the reduction of African American population in such a district - is actually retrogressive, a court must take account of the fact that "there are communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups" and thus have less need to "be a majority within a single district in order to elect candidates of their choice." *Id.*

In a Section 5 case, this court's analysis - while limited to the question of

retrogression - is fact-intensive and must carefully scrutinize the context in which the proposed voting changes will occur. In particular, the level of racially polarized voting, or the degree to which there is a correlation "between the race of a voter and the way in which the voter votes," *Thornburg v. Gingles*, 478 U.S. 30, 53 & n.21, 106 S. Ct. 2752 (1986), sheds light on whether a decrease in districts' minority populations will product an impermissibly retrogressive effect. "Unpacking" African American districts may have positive or negative consequences for the statewide electoral strength of African American voters. To the extent that voting patterns suggest that minority voters are in a better position to join forces with other segments of the population to elect minority preferred candidates, a decrease in a district's BVAP may have little or no effect on minority voting strength. *De Grandy*, 512 U.S. at 1020. In such circumstances, dilution of

of minority voting age population may have no retrogressive effect. However, if racially polarized voting persists in an area and its electoral history demonstrates that minority voters' preferences diverge greatly from those of non-minority voters, a decrease in BVAP may translate into a lessening of minority voting strength.

In scrutinizing the plans presented for preclearance, we must therefore consider whether the State has met its burden of demonstrating that the dispersion of African American voting age population throughout the districts is not so affected by racial bloc voting that it will have a negative impact on the opportunities available to Georgia's African American voters to make their collective voices heard.

Before beginning this analysis, we must first address the State's contention that the retrogression inquiry is limited to determining whether reapportioned districts provide minority voters with an "equal

opportunity" to elect minority candidates. Georgia contends that because its plan preserves for Black voters a reasonable - or equal - chance to elect candidates of choice in the three districts at issue, the State has satisfied Section5. Georgia thus asks us to apply a Section 2 test to the proposed plans. See, e.g., Quilter, 507 U.S. at 155 ("Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2."). The State's implicit argument is that retrogression cannot exist where its proposed plan satisfies Section 2.[37] We disagree.

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[37] Effectively, then, the State would have us adopt the converse of the argument reflected by the Supreme Court in the *Bossier Parish* cases. There, the Court rebuffed the claim that preclearance must be denied where a proposed plan violates Section 2 (or the Constitution). *See Bossier II*, 120 S. Ct. at 877; Bossier I, 520 U.S. at 476-85.

The Supreme Court has clearly articulated that Section 2 and Section 5 have separate functions in the scheme of the Voting Rights Act. Holder, 512 U.S. at 883-84 (Section 5 and Section 2 differ in "structure, purpose, and application"); *Morse v. Republican Party of Virginia*, 517 U.S. 186, 209-10, 116 S. Ct. 1186 (1996) (noting that Section 5 may cover a broader range of voting procedures than does Section 2).

These distinct roles are highlighted by the different inquiries mandated by Section 2 and Section 5. Under Section 5,"[i]f the change 'abridges the right to vote' relative to the status quo, preclearance is denied…" *Bossier II*, 528 U.S. at 334. The comparison here is not an abstract ideal such as equality or proportionality, as in a Section 2 case, but rather to a concrete, existing plan. *See Hall*, 512 U.S. at 883-884 (finding no Section 2 violation because the Court could not identify the "ideal" benchmark). The relativistic inquiry prescribed by the Court means that the nature of the existing benchmark plan will set the terms of the

retrogression analysis. The fact that a weak status quo may make preclearance easy does not mean that a stronger status quo should not make preclearance more difficult. The Supreme Court's distinction between the types of benchmarks implicated by Section 5 and Section 2 compels this court to conclude that a plan that diminishes existing minority strength, but which is not discriminatory, should not be precleared.

That the court rejects the State's position that a Section 5 violation can not exist without a violation of Section 2 does not mean that the question of whether its plans are in fact non-discriminatory is irrelevant to the retrogression inquiry. *See Bossier I*, 520 U.S. at 486-88. Evidence that a plan satisfies Section 2 by preserving reasonably good opportunities for African Americans voters to elect candidates of choice may bear on whether there has been impermissible retrogression under Section 5. Undoubtedly, a change that has this effect is less likely to be marked by retrogressive

intent. Yet, if existing opportunities of minority voters to exercise their franchise are robust, a proposed plan that leaves those voters with merely a "reasonable" or "fair" chance of electing a candidate of choice may constitute retrogression in overall minority voting strength.

Accordingly, the court's inquiry in this case will concentrate on whether the State's proposed reapportionment plans will diminish African American voters' opportunity to exert electoral power at the polls. While the parameters of the court's investigation are clear, and are grounded in settled law, this case presents a unique factual context. Georgia's State House and State Senate reapportionment plans were drafted to bolster support for the Democratic Party, in part by "unpacking" predominantly African American districts. The State Senate plan would redraw four districts with existing BVAPs of 55.43% to 62.45% such that they would have bare majorities of BVAP, ranging from 50.31

to 50.87 %. The slim nature of these majorities is cause for concern when considered in conjunction with levels of Black voter registration in the districts. In five of the "majority-minority" districts created under the reapportionment plan, percentages of Black voter registration range from 47.46 to 49.44%.[38] Under the benchmark plan, African American registration levels in these same districts ranges from 52.48% to 64.07%.

The appropriate analysis of these changes focuses on whether they are likely to diminish minority voters' ability to effectively exercise their franchise. The mere fact of dilution, the spreading out of minority voters, is not unlawful in the Section 5 context, at least to the extent that it does not lead to a palpable decrease in minority voting strength. *See Bossier Parrish II*, 528 U.s. 327 (finding that an

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[38] The court does not consider Senate District 34 in this range, as the district is new a newly created "majority-minority" district.

intent to dilute in violation of Section 5). In particular, if voting patterns are not marked by racially polarized voting or other barriers to the effective exercise of minority voters' franchise, dilution may have little or no effect on the ability of those voters to elect preferred candidates.

Accordingly, contrary to the fears expressed by plaintiff, the Voting Rights Act allows states to adopt plans that move minorities out of districts in which they formerly constituted a majority of the voting population, provided that racial divisions have healed to the point that numerical reductions will not necessarily translate into reductions in electoral power. In contrast, the more that white voters prove unwilling to cast their ballots for candidates preferred by minorities, and the more that different races decline to support the same candidates, the greater the negative impact of decreasing the percentage of minority voters will be on the electoral strength of those who are left behind.

In sum, then, just as cross-racial coalition-building -the opportunity "to pull, haul, and trade to find common political ground," *De Grandy*, 512 U.S. at 1020 - can allow smaller numbers to extend great influence, so too can its antitheses, racial - bloc voting, allow a drop in numbers to become a retrenchment of power. Thus, the more we find evidence of racial polarization in the disputed Senate districts, the more we are persuaded that Georgia has failed to meet its burden of proving that the reductions in African American populations in those districts and in other majority-minority districts has not lessened the ability of its African American voters to effectively exercise their collective right to vote.

C. Effect of Georgia's Reapportionment Plans

In considering each of the three redistricting plans submitted for review, the court must determine whether the State has

proven that the plans will not have a retrogressive effect on minority voting strength.

Measuring Minority Voting Strength

In large part, the retrogression inquiry looks to the plan's effect on minority voting strength by considering the number of potential African American voters in the existing and proposed districts. The 2000 census data - the very data that gives rise to the State's obligation to conduct reapportionment - presents a unique problem, and one which the court must address as preliminary matter. For the first time, the census permitted respondents to aver that they were of more that one race. Thus, in addition to responses that list only "Black," the census data includes data on individuals who identified as "Black" and other races. Ironically, the opportunity to more specifically identify one's race has given rise to a controversy regarding how best to identify a "Black" voter. The United States

relies on the Department of Justice Guidance issued in January, 2001, notifying covered jurisdictions that the United States would consider only Black and Black/White responses to be "Black voters" for purposes of preclearance. Yet, Georgia's redistricting office calculated "Black" population as including those individuals who responded to the census by identifying themselves as Black or Black and any other race. While Georgia's political science expert suggests that the difference is inconsequential, the two methods of counting Black voters lead to divergent conclusions about the number of majority-minority districts in the proposed plans.

In light of the dispute regarding the census data, the United States urges the court to consider Black registration data as further indication of the African American voting population of the proposed Senate Districts. This court is thus faced with three numbers - two calculations of BVAP and

registration data - all of which present different pictures of the proposed plan's effect on minority voters' exercise of their electoral franchise.

Courts have consistently relied on percentages of BVAP to consider whether minority voters' ability to exercise their franchise has been affected by a voting procedure change. For example, in *United Jewish Organizations*, the plurality opinion expressed a preference for voting age population statistics. 430 U.S. at 164 n.23 (opinion of White, J.). Current voting age population data is probative because it indicates the electoral potential of the minority community. However, as illustrated b the United States' cross-examination of Epstein, voting age population may not reflect the population of eligible voters, as it may include college and institutional populations.

On the other hand, the Court has cautioned against reliance on voter

registration data, which may reflect effects of prior discrimination or levels of apathy in the community. *See City of Rome*, 446 U.S. 156, 186, n.22, 100 S. Ct. 1548 (1980) (noting that courts had found that Black population figures, when "coupled with" BVAP data, "provides more probative evidence… that does voter registration data, which may perpetuate the effects of prior discrimination in the registration of voters,… or reflect a belief among the Negro population that it cannot elect a candidate of its choice…"). Epstein also testified that BVAP is a better indicator of minority voting strength than registration numbers. Tr., 2/5/02, p.m. at 49 ("Registration is very volatile. If you have a good voter registration drive, if you have different types of candidates running for office, any number of individual factors can influence Black registration as well as, of course, the normal population movements in and out of the district."); cf. U.S. Ex. 503 ¶ 6; U.S. Ex.

716, 11:25-13:11; 21:9-22:3; 25:19-26:5; U.S. Ex. 719, 66:3-21 (Senate District 2 residents testified that, in their experience, Black voter turnout is lower than the percentage of Black registered voters).

The United States urges this court to refrain from choosing one measurement, and rather to evaluate the entire picture, taking into account the different measurements of eligible African American voting population. The court agrees that such an approach is both prudent and in keeping with controlling precedent. In *Johnson v. De Grandy*, the Supreme Court rejected the idea that one "type" of number is necessarily more probative that all other numbers: "The legal standard is not total population, voting age population, voting age citizen population or registration, but the ability to elect. The Supreme Court repeatedly has declined to elevate any of these factual measures to a 'magic parameter.'" 512 U.S. 997, n. 14 (1994). In light of Supreme precedent, we

find that BVAP may be a more appropriate number to consider in determining whether a district is properly characterized as a "majority-minority" district. However, in its review of the proposed plan's predicted effect on Black voting strength, the court will consider *all* the record information, including total Black population, Black registration numbers and both BVAP numbers.

Such an approach also allows the court to avoid the troublesome and inevitably controversial question of who constitutes a "Black" voter for the purposes of the Voting Rights Act. The court is reluctant to enter the fray of the parties' dispute concerning the proper counting of mixed-race responses to the census. On one hand, we note that the Attorney General published a Guidance that gave advance notice of how it would calculate BVAP for the purposes of the Voting Rights Act. On the other hand, Georgia's decision to include all individuals who identified themselves as Black, whether as their only

race or in combination with any other race, is not inherently unreasonable. The State's decision is further supported by Dr. Harrison's expert report, which was unchallenged by the defendants. Pl. Ex. 26. The court does not find that the United States' or Georgia's calculation of BVAP is more or less probative. Rather, the court will consider both numbers in considering the overall effect of the proposed redistricting plans.

1. State Senate Plan

In evaluating the evidence of the Senate redistricting plan's purpose and effect, the court considers a wide range of factors that contribute to minority voting strength. First, the court reviews the evidence presented by plaintiff's expert, and, in particular, his statistical analysis predicting a correlation between BVAP and the opportunity of African American voters to elect candidates of choice. The court also considers the State's argument that the

reapportionment plans were necessitated by the underpopulation of the districts in question and the States obligation to abide by the constitutional principle of on person, one vote. The court reviews the - albeit sparse - evidence of racially polarized voting and the degree of white crossover voting in Senate Districts 2, 12 and 26. Finally, the court reviews the lay testimony proffered by the parties on the question of the proposed plans' effect on minority voters' ability to exercise their electoral franchise.

a. Probit Analysis and Decreases in Senate Districts' BVAP

The State of Georgia relies on Epstein's Report, together with the statistical data, lay testimony and reaggregation ananalysis performed by Engstrom, to meet its burden of demonstrating that the proposed Senate redistricting plan would not have a retrogressive effect. Two significant and novel issues are presented by Georgia's

reliance on Epstein's report. First we must determine what, if any, relevance Epstein's results have for our analysis of whether the proposed plans are retrogressive. In other words, if the court is persuaded that a district with 44.3% BVAP has a 50% chance of electing minority voters' candidate of choice, in what way is the calculation of this point of "equal opportunity" relevant to retrogression? A second, related, question is whether a decrease in the probability of electing a candidate of choice, without more, constitutes a retrogressive effect within the meaning of *Beer*.

Epstein's report demonstrates that is a correlation between a district's BVAP and the likelihood that a candidate of choice will be elected in that district. None of the parties have disrupted the existence of this correlation. It is the significance of this correlation that is disputed. Georgia argues that identification of the point at which African American and non-African American

voters have "equal" chances of electing preferred candidates will permit the court to determine if African American voters will retain their voting strength under the proposed plans. Georgia urges this court to take Epstein's magic number of a "point of equal opportunity" at 44.3% BVAP and apply it to each of the plans - and, indeed, each of the plans -and, indeed, each of the electoral districts - currently before the court. This approach is untenable.

The court rejects the notion that the "point of equal opportunity" is in any way dispositive of the Section 5 inquiry. The Supreme Court has repeatedly held that, while a Section 2 suit compares the change in voting procedures to an ideal, fair benchmark, Section 5 actions must compare the proposed plan to the existing opportunities to elect candidates of choice. Hall, 512 U.S. at 883-84. Thus, as already discussed, our analysis must focus, not on the level of BVAP that will ensure a "fair" or "equal"

opportunity to elect preferred candidates, but on whether the proposed changes would decrease minority voters' opportunities to elect candidates of choice.

Epstein analyzes retrogression in two ways. First, he compares the number of majority-minority districts under the existing and proposed senate plans. He presents no expert opinion as to the statistics significance of this comparison, and relies on no underlying analysis for this comparison. He has merely placed the census data in a tabular form.

The second analysis of retrogression is based on Epstein's "equal opportunity" point, and simply counts the number of districts with BVAPs higher than 44.3% under the existing and proposed plans. This comparison is problematic for the same reasons that Epstein's "equal opportunity" point is uninformative; it tells the court nothing about the relative increase or decreases in minority voting power.

Furthermore, the "equal opportunity" comparison assumes that all seats in the proposed Senate Districts should be analyzed as open seats. Yet, Epstein's report concludes that the point of equal opportunity was much higher where a White incumbent was in office - 56.5% BVAP. Senator Michael Meyer von Bremen, a White man, currently occupies the seat for Senate District 12. Over 72% of proposed Senate District 12 would be comprised of the benchmark district. U.S. Ex. 112 would be comprised of the benchmark district. U.S. Ex. 112. Given Epstein's own explanation of his decision to "code" Senator McKinney as running for an open seat because he was "following the rule that open seat as having less than 50 percent of [one's] former constituents," *see* TR., 2/4/02, p.m. at 62, the court does not understand how Epstein could fail to consider Senator Meyer von Bremen to be a White incumbent. Thus, Epstein's "retrogression" analysis tells the court little or nothing about actual minority

voting strength in the "counted" districts. By simplifying the nature of the retrogression inquiry as he has, Epstein has rendered his analysis all but irrelevant.

We do not suggest that a probit analysis may never be a valuable tool for examining retrogression, but merely that the one offered by the State in this case is entirely inadequate to that task. Presumably, probit analysis could evaluate the increases and decreases in BVAP in each proposed district and assess the statewide increase or decrease in the probability that minority preferred candidates will be elected under the proposed plan. Here, however, Epstein made no attempt to address the central issue before the court; whether the State's proposal is retrogressive. He failed even to identify the decreases in BVAP that would occur under the proposed plan, and certainly did not identify corresponding reductions in the

electability of African American candidates of choice. The paucity of information in Epstein's report thus leaves us unable to use his analysis to assess the expected change in African American voting strength statewide that will be brought by the proposed Senate plan.

While questioning the relevance of Epstein's testimony regarding the "equal opportunity point," and noting the severe shortcomings of the probit analysis identified by the defendants, the court nevertheless takes note of Epstein's uncontradicted predicted correlations between BVAP and the likelihood of electing a candidate of choice. These correlations are plotted on his "S curve," and were discussed in his cross-examination and redirect testimony. As reflected in the table below, according to Georgia's calculations of BVAP, only one of the existing majority-minority districts would no experience one of the existing majority- minority districts would

not experience a decrease in BVAP under the proposed plan. Furthermore, District 44, which currently has a majority Black population and majority of Black registered voters, but has 49.21% BVAP, would also experience a substantial decrease in its BVAP. The BVAP of District 34, the plan's proposed new majority-minority seat, would increase. Of the remaining twelve districts in which the BVAP decreases, reductions of over 10% are present in nine districts. The following table shows the effect of the proposed Senate plan on the BVAPs of

District	Net change in BVP% (Ga.)
43	-26.28%
38	-16.32%
35	-15.33%
44	-14.91%
22	-12.00%
55	-11.76%
26	-11.65%
15	-11.18%
2	-10.27%
10	-6.52%
12	-4.77%
36	-3.42%
39	1.81%
34	16.58%

U.S. Ex. 118; Pl. Ex. 25, app. III.

Epstein testified that a drop in a district's BVAP would result in a diminished likelihood of success for African American preferred candidates. According to Epstein's "S curve" and his testimony, the impact of a decrease in percentages of BVAP will vary depending on where it occurs in the curve, or, in other words, in relation to the actual level of a district's BVAP in a district. Thus, a 5.7% decrease in a district's BVAP from 50% to 44.3% would, according to Epstein's analysis, result in a 25% decline in the likelihood that a candidate of choice would be elected. However, a similar decline in BVAP would not have the same effect if the overall BVAPs were higher. Thus, in Senate District 10, where the proposed plan would decrease BVAP by 6.52%, reducing BVAP from 69.72% to 63.42%, Epstein's "S curve" indicates that this would reduce only slightly the probability of electing an African American preferred candidate.

Unfortunately, it is impossible to read Epstein's curve in any accurate fashion, and his expert report provides no additional guidance or information.[39] Nevertheless, the court does find Epstein's testimony relevant insofar as it suggests that decreases in BVAP within the ranges proposed in the contested Senate districts may have a significant (if inadequately quantified) negative impact on the likelihood that African American voters will be able to elect their candidates of choice.

b. Underpopulation of Existing Senate Districts

The benchmark plan for Section 5 purposes is the last legally enforceable plan, which in this case is Georgia's existing Senate plan. *Abrams v. Johnson*, 521 U.S. 74, 97, 117 S. Ct. 1925, 1939 (1997). Georgia argues that the demographics of the

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[39] On redirect, Epstein relied on his S-curve to testify that, in District 43, with 65.18% BVAP, he estimated the probability at 90% to 95%, in district 48, with 61.13%, he estimated probability at approximately 95%. Tr., 2/5/02, a.m. at 84.

existing plan do not represent a fair basis for comparison because, in light of the 2000 census, the districts at issue are all underpopulated, and thus in violation of the principles of one person-one vote. *See Wesberry v. Sanders*, 376 U.S. 1, 84 S. Ct. 526 (1964) (holding unconstitutional gross disparities of population across Georgia congressional districts and the resulting dilution of voting rights of residents of the more populous districts).

The State contends that, where population had to be added to districts, it was inevitable that their BVAP levels would decrease. See, e.g., PPFF at ¶ 621 ("While the BVAP levels in the majority-minority district have decreased, that was inevitable as a result of the fact that those districts where generally short of population. This is particularly true with regard to the three districts with which Defendants have taken issue."). Georgia suggests that this alleged quandary insulates its plan from a section 5 challenge. *See* Pl. Post-Tr. Br. at 47-48. This argument is unavailing. First, even if

the State is correct that some reductions in BVAP were inevitable - a proposition that it asserts without attempting to prove - it certainly does not follow that Georgia as compelled to move minorities out of Districts 2, 12 and 26 to the extent that it did. Indeed, the State actually removed some majority African American precincts from each of these districts, a decision that at least casts doubt on its cries of inevitability.[40]

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[40] The following Cable shows the percentages of black registered voters residing in the precincts that were moved out of the proposed districts, and those that were added to the districts.

SD	Deviation	Reg. Voters moved out	Black reg % of removed precincts	Reg. votes added	Black Reg., % of added precincts
2	-24.37%	7,835/8,626 9(approx.42% of total added voters)	20.39% 21.83%	23.225 24.46*	14.97% 15.89%
12	-17.77%	10.705 (approx. 91% of total added voters)	46.64%	17.228	30.28%
26	-28.65%	14.047 (approx.54% of total added boters)	41.80%	33,202 30,484*	20.20%

Net add of reg. voters	Black Reg. Voters, % of net add. reg. voter
18,866 17,533*	12.86% 11.8%
9,928	18.25%
23,295 19,678	11.0% 13.09%*

USPFF a ¶¶ 181,326,380; Pl.'s Resp. to ¶¶ 181,326,380. *Plaintiff's responses present different calculations. These are marked with an asterick.

While the precincts added to the proposed districts also contain significant African American communities, the overall effect of the reapportionment is to reduce the percentage of BVAP in these districts.

As the United States has illustrated, there were alternative plans available that would both have comported with the constitutional principle of one person-one vote and have allowed the retention of greater numbers of African American voters in the disputed districts. *See* U.S. Exs. 213-23; 313-18; 414-19. For example, in Senate District 2, the United States notes that Hunter Army Air Field was removed from the proposed district. The inclusion of the army

base would have permitted the district, which was in need of population, to add population while avoiding a reduction in BVAP. See U.S. Ex. 733, 192: 1-14 (Meggers' testimony); USPFF ¶¶ 214-15.

Moreover, the State, despite its suggestion to the contrary, was not forced to choose between complying with the Equal Protections Clause and the Voting Rights Act. It is true that the dictates of one person-one vote may at times force a redistricting state to reduce the minority population in a district that previously was strongly majority-minority. However, the mere fact that BVAP decreases in certain districts is not enough to deny preclearance to a plan under Section 5. Instead, retrogression concerns are implicated when it appears that the numerical changes may diminish effective minority voting power. A State is free under Section 5 to reduce BVAP levels in a district in order to bring that district into compliance with the Fourteenth Amendment, so long as in so doing it does not limit the ability of the remaining minority voters to

elect candidates of choice. Cf. Bush, 517 U.S. at 982-83; 116 S. Ct. 1963 (suggesting exception when no feasible alternative plan exists). Read in this way, the Voting Rights Act continues to serve its historical purpose of protecting minorities in the exercise of their electoral franchise without running afoul of the Constitution's overarching demand of equality.

c. Evidence of Racial Voting Patterns

Racially polarized voting "exists where there is a consistent relationship between the race of the voter and the way in which the voter votes." *Gingles*, 478 U.S. at 54 n.21. Recognizing that "there is no simple doctrinal test for the existence of legally significant racial bloc voting," *Gingles* noted that Section 2 inquiries are necessarily fact-sensitive. *Id.* at 58. Justice Brennen suggested a number of factors that courts may consider under Section 2.

> [A] White bloc vote that normally will defeat the combined strength strength of minority support plus White "cross-over" votes rises to the Level of legally significant White Bloc voting. The amount of White bloc Voting that can generally "minimize or

> Cancel" Black voters' ability to elect Representatives of their choice, however, will vary from district to district according to a number of factors, including the nature of the allegedly dilutive electoral mechanism; the presence or absence of other potentially dilutive electoral device…; the percentage of registered voters in the district who are members of the minority group; [and] the size of the district[.]

478 U.S. at 56. As explained above, in the present case, racial polarization is critically important because its presence or absence in the Senate Districts challenged by the United States goes a long way to determining whether or not the decreases in BVAP and African American voter registration in those districts are likely to produce retrogressive effects. Georgia's own expert demonstrated that, given some varying amounts of racial polarization and crossover voting, minority voters' ability to elect candidates of choice is likely to decrease districts' BVAP diminishes. Epstein's probit anaysis necessarily subsumes information about racial

voting patterns and voter turnout.[41] Whether an African American candidate of choice wins election is necessarily determined by the degree of racial bloc voting by African American voters and the level of White crossover votes received by the candidate. However, it is impossible to extrapolate these voting patterns from Epstein's database. As Epstein admitted on cross-examination:

> the whole point of my analysis is not to look at polarization per se. The question is not whether or not Blacks and Whites in general vote for different candidates.

Tr., 2/4/02, p.m. at 44-45.

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[41] Epstein testified: "the great advantage of using probit analysis here, is, I'm not concerned with trying to figure out whether or not Black candidates are getting elected via greater turnout, crossover, registration,… campaign appeals. Those all might be there and they're important, but if all you want to do is…estimate something on the level of the district characteristics, then you're using estimated district characteristics… I'm looking at the different kinds of districts, see who elected a Black candidate of choice and who didn't." Tr., 2/5/02, a.m. at 108-09.

Although not drawing any legal conclusions, Epstein testified that, in order to assess whether there has been retrogression in the voting rights of people who live in a reconfigured district, it would be necessary to consider whether the district was "significantly different" than the rest of the State. Tr., 2/5/02, a.m. at 70. Epstein also admitted that, in his opinion, a candidate running for office in a particular district would want to take into account whether White crossover was at 25% or at 52%. *Id.* at 72. It is inevitable that there will be "local variability" in elections. In fact, Epstein notes that his "final conclusion… is not that there is no difference… from one area to another." *Id.*

Epstein did not perform any ecological regression analysis of voting patterns in Senate Districts 2 or 26. Epstein did, however, perform an ecological regression analysis for an election in Senate District 12. In the 1998 Senate election, he found

that the winning White candidate was not the African American candidate of choice, and in fact, received very little Black support. Tr., 2/4/02, p.m. at 50. He testified that, to his recollection, the ecological regression analysis had shown "very high levels of polarization" in that election. *Id.*

Thus, with the exception of Epstein's analysis of one election in Senate District 12, the only evidence of racially polarized voting before the court is Engstrom's expert report. The report provides the results of two different methodologies of analyzing racial voting patterns in Senate Districts 2, 12, and 26. Engstrom considered local elections to assess the "extent of racial voting correlations" in the existing district. Tr., 2/5/02, p.m. at 12. He also performed a reaggregation analysis, which gathered precinct-level results from seven statewide elections between an African American candidate and a White candidate and

predicted results for the proposed Senate Districts. The results of Engstrom's analysis are discussed at length in the court's Findings of Fact.

The State would use Engstrom's reaggregation analysis to prove its case. The State argues that the reaggregation analysis is the only record evidence that attempts to estimate voting patterns in the proposed districts. By Engstrom's own admission, the reaggregation results suggest the presence of sufficient White crossover voting to permit some African American candidates of choice to prevail in the redrawn districts. Furthermore, Engstrom can only guess at the reasons for the different voting patterns in statewide and local elections. However, we find that Engstrom has presented compelling evidence that racial voting patterns in State Senate races can be expected to differ from racial voting patterns in statewide races.

Before discussing Engstrom's analysis of voting patterns in local elections, we must first address some concerns with the relevance of this analysis. Plaintiff underscores the absence of any information in Engtrom's report that would identify the overlap of the jurisdiction in which the local elections analyzed by Engstrom took place and the proposed Senate Districts. Pl. Post-Tr. Br. At 15; *see also* Tr., 2/5/02, p.m. at 20. Although the court is ultimately unable to determine the exact extent of overlap present, it is clear that a substantial portion of the jurisdictions considered by Engstrom will fall within the proposed Senate Districts.

Engstrom did not attempt to compare the proposed plan with the benchmark plan, Tr., 2/5/02, p.m. at 70, and, in fact, looked only at racial polarization in existing Senate Districts. In its Post-Trial Brief, the United State, without citing to any record evidence, states that "the county elections

analyzed involve counties that make up the overwhelming majority of all three districts at issue." U.S. Post-Trial Br. at 96. The Court has searched the record and found evidence describing the overlap of the existing and proposed Senate Districts,[42] as well as overlap of the existing and proposed Senate Districts.[43] However, Engstrom looked at city elections for Savannah, Macon and Albany, and there is no evidence in the record that would assist the court in

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[42] 65.39% of the proposed Senate District 2 is comprised of the population from the existing District. U.S. Ex. 112. 72.68% of the proposed Senate District 12 is comprised of the population from the existing District 12. *Id*

[43] The United States introduced a listing of counties included in the proposed Senate District. This listing indicates that Dougherty County is split between the proposed Senate Districts 12, 13, and 14. U.S. Ex. 111. In contrast, Bibb County appears to be wholly located within the proposed Senate District 26. *Id.*

determining these cities' limits. Engstrom also considered two State House races, but again, no record evidence permits the court to compare the geographical reach of the House Districts to the proposed Senate Districts.

These gaps in the record do not require the court to disregard the local election data and analysis provided by Engstrom. It is clear that a substantial portion of the benchmark Senate Districts and Bibb County comprise the proposed districts. Furthermore, the State has not denied the United States' assertion that the county and city elections analyzed involve a majority of the voters in the benchmark and proposed districts at issue. Ultimately, the burden of proof in this matter lies with the State. We look to the State to explain why retrogression is not present, and to prove the absence of racially polarized voting that might diminish African American voting strength in light of several districts' decreased BVAPs.

We find that Engstrom's report presents relevant information, and indicates that Senate elections in the redrawn districts will be marked high levels of polarized voting. Plaintiff has presented no evidence to suggest otherwise. [44]

The State's primary critique of Engstrom's report posits that his analysis of racial polarization is flawed because it only considers the level of White crossover voting.[45] The State argues that a better

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[44] To the extent that African American legislators testified that they believe candidates of choice could be elected under the proposed plan, they did not suggest that racially polarized voting did not exist in Georgia.

[45] The State advances two additional arguments, which we address only briefly. Plaintiff argues that Engstrom's analysis is flawed because he failed to consider the outcomes of the elections included in his report. The State belabors the point that several of the African American candidates in races, in which Engstrom finds racially polarized voting, were elected. However, plaintiff offered no testimony that would persuade this court that these candidates' victories disprove the existence of

indicator of racial polarization is the difference of votes received from African American and non-African American voters. *See* Pl.'s Resp. to USPFF ¶ 426 (arguing that, "in looking at the actual *difference* of issue, it is apparent that the patterns in

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racially polarized voting. Rather, Engstrom testified that the fact that an African American candidate won in the general election would not change any of his opinions with respect to the levels of racially polarized voting. Tr., 2/5/02, p.m. at 86-87. He further explained that the victories were typically in majority-minority jurisdiction. *Id.* Contrary to the suggestion of our dissenting colleague, the court in no way considers electoral victories by African American candidates to be aberrations; rather, the court can conclude only that, given specific demographics and voting patterns, African American candidates of choice may win election despite racially polarized voting.

The State of Georgia also argues that Engstrom's report does not take into account the level of African American voter turn-out at Democratic Party primaries at a higher rate than other voters. They are able to influence the outcome of the primaries, and that the Democratic candidate was likely to win in the general election. However, there is no reliable record evidence concerning voter turn-out, at primaries or at general elections.

the statewide elections was [sic] indistinguishable from that in the local elections"). For example, instead of focusing on Engstrom's estimate that Senator Thomas received 78.8% of African American votes in District 2, the State suggests that the difference between that number and the level of White crossover voting for Thomas (8.9%), is a more accurate reflection of race-based voting patterns.

Georgia relies on its analysis of "preference differentials" to suggest that the regression analyses done by Engstrom on the local election data demonstrate the same pattern as does his reaggregation analysis of statewide elections. Georgia identifies the range of the differences in support in Engstrom's local election data, and posits that this range corresponds to the range seen in the reaggregation results. Georgia asks the court to conclude that the similarity of "ranges" demonstrates that the level of racial polarization is the same in local

elections as it is in election for statewide office. The next step in this logic, according to the State, is to credit Table 4 over Tables 1-3, and to conclude that African American candidates have "good chance[s]" of winning election. Tr., 2/5/02, p.m. at 89 (Engstrom admits that reaggregation results show a "good chance" of African American candidate winning).

It is fanciful to think that the court will defer to counsel's alternative "expert" theories. No expert testimony has been presented to suggest that comparing "ranges" of numbers will result in probative evidence. For example, the court does not see why a comparison of the ranges of the relative support levels is necessarily any more probative than a comparison of the average

levels of the differences in support.[46] The court is not persuaded that the method of comparing the ranges of the differentials suggested by plaintiff's counsel is at all

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46 By way of illustration only, the court provides the following calculations of average differences in support for African American preferred candidates in those elections listed by Engstrom on Senate Districts 2 and 26, and in Bibb County, which appears to be primarily, if not totally, within District 12.

Average difference in percentages of African American and Non-African American Support fro African American Preferred Candidates

District 2

Senate 2 elections	Statewide elections
63.58%	45.99%

District 12

Senate 12 elections (primaries)	Statewide elections
63.05%	28.43%

District 26

Bibb County elections	Statewide elections
55.72%	40.2%

The differentials are based on the King Ecological Inference numbers contained in Engstrom's Tables 1-3

probative. While open to the contention that the difference in levels of White and African American voter support may be probative of the degree of racial polarization, the court sees no way that it may competently interpret this information in the absence of expert evidence to this effect.

In light of the problems with the State's own statistical evidence and its inability to cast significant doubt on that presented by the United States, we are compelled to conclude that the evidence of racial polarization suggests the likelihood of retrogression. Indeed, despite the importance for such information to the Section 5 inquiry, plaintiff has provided the court with no competent, comprehensive information regarding White crossover voting or levels of polarization in individual districts across the State. At the same time, the United States has produced credible evidence that suggests the existence of highly racially polarized voting in the

proposed districts. As emphasized above, an African American candidate's ability to succeed in a jurisdiction will depend on the levels of polarization and White crossover voting. Engstrom's testimony suggests that Senate races in the proposed districts will be marked by racially polarized voting. This evidence undermines the utility of Epstein's probit analysis because that analysis fails to account for variations in levels of racial polarization. And plaintiff has presented no other evidence to persuade us that voting in future Senate races in the contested districts will not be racially polarized. Consequently, the court can not find by a preponderance of the evidence that the planned reductions in BVAP and in the number of African American registered voters in Senate District 2, 12 and 26 will not diminish African American voting strength in these districts. Once again, we note that it may well be the case that any decrease in African American electoral power in Senate

Districts 2, 12 and 26 will be offset by gains in other districts, but plaintiff has failed to present any such evidence.

d. Lay Testimony

The electoral history of the jurisdiction may shed considerable light on the effects that reapportionment will have on minority voting strength. One part of that electoral history is found in racial voting patterns and the willingness of voters to cast ballots for candidates of different races. Lay witness testimony regarding the use of race in politics and elections is also relevant.

The court is presented with two types of lay testimony regarding the electoral climate of the disputed districts and the Senate in general; (1) testimony by legislators and others involved in the drafting of the reapportionment plan; and (2) testimony by legislators and citizens providing opinions about minority voting strength.

African American Legislators' Support of Redistricting Plan

The State relies heavily on the unanimity of African American legislators' support for the reapportionment plan to argue that the plan does not have a retrogressive effect. Plaintiff characterizes as "indisputable" the proposition that African American elected representatives are in the best position to judge "as a matter of fact" whether the reapportionment plans enhance or diminish minority voting strength. PPFF ¶ 618. The court, however, notes that the United States has presented extensive evidence of African American Senators' misgivings about the Senate plan. Nevertheless, only two African American legislators voted against the plan. The court will not look behind those votes to question such inherently political decisions. A vote for legislation is almost always a compromise of some sort, motivated by a complex intersection of self-interest and external pressures. A court that tries to

unpact these forces, and assign probative weight to them, treads a treacherous path. Accordingly, we are loathe to rely on testimony regarding the nature of legislative trade-offs, or on pos-hoc expressions of doubt on the part of legislators who nevertheless voted for the contested plan. Certainly, as it relates to the plan's possible retrogressive effect, this is dubious evidence indeed.

That said, it is undoubtedly true that support among minority legislators for a reapportionment plan can sometimes be relevant in assessing the legality of that plan under the Voting Rights Act:

> The protection of existing relationships among incumbents and their constituents, and the benefits accruing to the state from the seniority its delegation may have achieved in Congress, are pragmatic considerations which often figure prominently in the drawing of congressional districts. These considerations are not talismanic, however, and may not serve to protect incumbents by imposing an electoral scheme which splinters a geographically concentrated Black populace within a racially polarized parish, thus minimizing the Black citizenry's electoral participation.

Major v. Treen, 574 F. Supp. 325, 355 (E.D. La.1983). In this case, the State has presented no authority suggesting why the court should consider the support of African American legislators as evidence the actual *effect* of the Senate redistricting plan will no be to decrease minority voters' opportunities to elect candidates of choice. We believe the legislators' support is, in the end, far more probative of a lack of retrogressive purpose than of an absence of retrogressive *effect*.

Voting patterns in Senate Districts 2, 12 and 26

The record is replete with lay testimony regarding individuals' predictions as to whether the redrawn districts will permit minority voters to elect candidates of choice. Several incumbent Senators testified that they believed the plan gave them and others a "fair" or "responsible" chance of victory in the redrawn districts. *See, e.g.*, Brown dep. at 30, Walker dep. at 12. However, Senator Fort expressed

concerns that the plans might be retrogressive. Int. Ex. 16 at 3.

The United States has offered the testimony of eleven witnesses from Chatham County with respect to the proposed Senate District 2, including two State Senators, four African American Commissioners, and three members of the Executive committee of the Savannah Branch of the NAACP. They testified that they believe the boundaries of Proposed Senate District 2. will reduce the opportunity that African American voters have, under the benchmark Senate District 2, to elect candidates of choice. USPFF at ¶ 187.

Dr. Jackson, President of the Savannah Branch of the NAACP, sent a letter to the Governor of Georgia on August 6, 2001, expressing his opposition to the proposed changes, and suggesting that they "would serve only to dilute the Black votes and eventually delete the Black Legislators in this area." U.S. Ex. 504, ¶ 23; U.S. Ex. 504, ¶¶ 10, 24 (NAACP executive member

testifying that the proposed districts would weaken minority voting strength); U.S. Ex. 509. ¶ 10 (same). The city aldermen expressed similar concerns that the opportunities for African American voters to elect candidates of choice will diminish. U.S. Ex. 501, ¶ 5 ; U.S. Ex. 505, ¶ 5; U.S. Ex. 502, ¶ 16.

Two witnesses from Senate District 2 testified that African American voter registration rate is lower than the White voter registration rate in Chatham Count, leading to a majority of White registered voters, despite a majority African American population. U.S. Ex. 503 ¶ 6, U. S. Ex. 716, 11:25-13:11; 21:9-22:3; 25:19-26:5 (Jackson, NAAPC); U.S. Ex. 719, 66:3-21 (Rivers, Chatham County Bd. Comm.). Furthermore, seven of the witnesses, including NAACP Executive members, County commissioners, Aldermen and Senator Thomas, testified the White voter turnout is generally higher than African American voter

turnout in Chatham County.[47]

Ms. Thomas notes that, in her experience, her White opponents have always won majority White precincts. U.S. Ex. 704, 104:11-19 (Thomas). Other witnesses from Chatham County testified to high levels of polarized voting; i.e. that voters cast their ballots for candidates of the same race as themselves. One NAACP member, who worked at television station, testified that the staff routinely relied upon polarized voting patterns to predict election results from precincts that had not reported their returns. U.S. Ex. 504, ¶ 6 (Johnson). Another witness testified to the use of racial appeals to White voters in the 1995

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[47] See, e.g., U.S. Ex. 704, 104: 11-19 (Senator Thomas), U.S. Ex. 716, 22:4-24 (Dr. Jackson, NAACP); U. S. Ex. 505 ¶ 9; U. S. Ex. 709, 35:5-20, 36:2-7, 63:17-65:4 (Alderman Jones); U.S. Ex. 712, 53:20-54:5 (Alderman Jackson); U.S. Ex/ 507 ¶ 12; U.S. Ex. 717, 22:20-25:8, 27:23-28:15 (Country Bd. Comm. Odell); U.S. Ex. 715 66:24-67:3 (County Bd. Comm. Rivers).

Savannah mayoral election and the 1999 Savannah municipal election. USPFF ¶¶ 210, 211; U.S. Ex.712 (Alderman Jackson) (stating that White opponent labeled Alderman Jackson a "Farrakhan supporter").

With respect to Senate District 12, the United States offers the testimony of five African American declarants, one former and two current City Commissioners, a former Representative to the State House, and the former president of Doughtery County NAACP. Two of the witnesses, Mr. John White and Mr. Charles Sherrod, ran for the senate District 12 seat.

City Commissioners Williams and White testified that they felt the flier distributed by White's white opponent, Mark Taylor, in the course of the 1996 Democratic Party primary, was an attempt to encourage white voters to vote against African American candidates. U.S. Ex. 513 ¶ 12. The flier compared White to Williams, who was outspoken on issues of city contracts

with Black-owned businesses, affirmative action in city government and affordable housing, and urged people not to vote in the Republican Party primary, but to vote against White in the Democratic Party primary. *Id.* White characterized the flier as "a call to arms for White voter to rally together to defeat a Black candidate." U.S. Ex. 513 ¶ 12.

The United States' lay witness evidence from Senate District 26 does not paint a picture of such a racially charged political environment, as is suggested by the lay testimony about Senate Districts 2 and 12. Senator Robert Brown is the incumbent and has been reelected without opposition three times, and once without opposition in the general election. Most witnesses believed that incumbent Senator Brown would be re-elected under the proposed plans; however, they were especially fearful that it will be difficult to elect a candidate of choice in the proposed Senate District 26 if Senator Brown did not decide to run for re-election.

U.S. Ex. 516 ¶ 7; (Barnes, Bibb County Bd. Of Ed.); U.S. Ex.519 ¶ 8; U.S Ex.725, 36:15-37:3 (Hart, County Comm.). The witnesses from Senate District 26 expressed concerns about the reductions in the district's minority population and testified that people tend to vote along racial lines. *See, e.g.*, U.S. Ex. 515 ¶ 6; U.S. Ex. 723, 53:11-16 (Abrams, Bibb County Bd. Of Ed.); U.S. Ex. 726, 28:11-29:10, 82:22-85:5 (Bivens, County Comm.). However, these witnesses did not describe the type of racial appeals or polarized voting evident in Senate District 2 and 12.

The State argues that admissions by the United States' declarants that it would be possible to elect candidates of choice in the proposed districts are evidence that no retrogression will occur. For example, Alderman Clifton Jones states that, "although more difficult under the new plan for Senate District 2, blacks still have a fair opportunity to elect the candidate of their choice." C. Jones dep. at 63.

However, the State's reliance on these statements as is misplaced as is its reliance on the "equal opportunity point." The retrogression analysis does not ask if a proposed district is 'fair" or whether a possibility exists that a minority preferred candidate would be elected. Indeed, Jones' statement that it would be "more difficult" to elect a candidate of choice points to a retrogression in minority voting strength.

Legislative Influence

A final note is required due to an argument advanced by Georgia that rests on the expectation that the proposed districts will elect Democratic candidates. Georgia asserts that African American voters in Georgia tend to vote for Democratic Party candidates in excess of 90% of the time. While this assertion appears to be unsupported by empirical evidence, Epstein provides this number in a footnote, pl. Ex. 25 at 17 n.14, and several of plaintiff's

lay witnesses support the proposition that African Americans overwhelmingly vote for Democratic candidates. However, it does not follow that anything that is good for the Democratic Party is good for African American voters - at least, within the context of this court's Section 5 inquiry.

Georgia asks the court to equate African American voters' electoral strength with the success of the Democratic Party at the polls. "The evidence in this case is absolutely uncontradicted that minority voting strength is enhanced by the Democratic strategy, joined in by both black and white Democrats, to maintain Democratic majority in the Senate." BPPFF at ¶ 618. The reapportionment plan has been crafted predominantly to ensure continued Democratic control of the State Senate, and plaintiff explains that the "political performance" statistics for African Americans influenced the redrawing of the districts.

However, Engstrom's analysis of racial voting patterns demonstrates that White and

African American voters regularly prefer different Democratic candidates at Democratic Party primaries. U.S. Ex. 601, tables 1-3. Furthermore, the record demonstrates that many of the proposed senate districts were drawn to protect current White Democratic incumbents. *See* U.S. Ex.703, 49:7-16, 80:4-81:20 (Senator Brown testified that he considered White Democrats to be the weakest link in the redistricting process, and that he excluded majority African American precincts from his district in order to assist neighboring White Democratic incumbents).

Plaintiff urges the court to consider "legislative influence" as a factor in assessing the effectiveness of minority voting strength. All of the African American legislators currently serving in the Georgia General Assembly are Democrats. Senator Brown testified that, were Republicans to be the majority in the Senate, Democratic African Americans would lose several positions as committee chairs.

See, e.g., pl. Ex. 20 at 23-24. Congressman John Lewis testified to similar conclusions:

> I happen to believe that it is in the best interest of African American voters, and as far as I'm concerned, to all voters and all citizens, to have a continued Democratic-controlled legislature in Georgia. First of all, the great majority, and I think all of the Black legislators presently elected, and most of the would-be Black candidates are Democrats or will be Democrats in the General Assembly.
>
> So, if Black elected officials, Black state legislators, are going to have any sense of control, any sense of power, as chairs of full committees or chairs of sub-committees, it will come with being in the majority. And when in the minority, they lose all of that. They lose the possibility of maintaining a chairman-ship of a full committee or subcommittee.
>
> The great majority of the African American voters in the State of Georgia, 90 percent or more tend to vote the Democratic way. So, it's in our best interest for us to maintain a Democratic-controlled state legislature. I think that's important. I think this is a must.

Pl. Ex. 21, at 18-21 (Congressman Lewis Test.).

The State has pointed to no authority that supports the proposition that a

political party's overall success, and accompanying positions of power for minority legislators, should be considered in assessing minority voters' effective exercise of their franchise. Indeed, *Whitcomb V. Chavis* suggests otherwise. There, the Court specifically distinguished between " racial vote dilution" and "political defeat at the polls." 403 U.S. 124, 153, 91 S. Ct. 1858 (1971). The court concluded that the evidence demonstrated a lack of racial bias in the voting community. *Id.* Nothing in the record suggested that African American citizens were prevented from registering to vote, were excluded from political parties, or were overlooked in the candidate slating process. *Id.* at 149-50. Had the Democrats won more election, the Court concluded, the African American community would have had no complaints about its representation. *Id.* Because most of the elections under consideration were won by Republicans, however, "the failure of the [Black community] to have legislative seats

in proportion to its population[] emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'cancelled out' …, but this seems more a euphemism for political defeat at the polls." *Id.* at 153.

In League of United Latin American Citizens v. Clements, the Fifth Circuit considered a claim that a Section 2 violation was shown where plaintiffs argued that highly partisan voting was indicative of racially polarized voting because the majority of Republicans were White. 999 F. 2d 831 (5th Cir. 1993). While concluding that political parties did not serve as proxies for race, *id.* at 860, the court agreed that "courts should no summarily dismiss vote dilution claims in cases where racially divergent voting patterns correspond with partisan affiliation as 'political defeats' not cognizable under § 2." *Id.* at 860- 61.

We believe that the converse is also true. Where a change in voting procedures will favor a political party supported by African Americans, courts need not conclude that African American voters' strength corresponds to that success. Rather, as did the Fifth Circuit, courts have an obligation to base their inquiry "upon a searching practical evaluation of the 'past and present reality.'" Id. at 860. The inquiry in this Section 5 matter requires us to scrutinize the opportunities for minority voters in the redrawn districts to exercise their electoral franchise. The court emphatically rejects the notion that a plan that protects Democratic incumbents and a Democratic majority is necessarily a plan that does not retrogress with respect to African American voting strength. Whatever success the Georgia Democratic Party may enjoy as a result of the Senate redistricting plan does not and cannot immunize the plan's racially retrogressive effects from Section 5 attack. The Voting Rights Act was not enacted to safeguard the

electoral fortunes of any particular political party.

e. Conclusion

In asking this court to enter a declaratory judgment that its Senate reapportionment plan does not have the effect of worsening minority voters' opportunities to effectively exercise their voting rights, the State must present competent evidence that will permit the court to engage in the analysis mandated by the Voting Rights Act.

We have engaged in a searching review of the record for evidence that would facilitate a competent comparison of the benchmark Senate plan and the proposed plan, and their consequences for the voting strength of Georgia's African American population. We conclude that the State has not met its burden of proof. The expert testimony presented by the plaintiff was woefully inadequate. Epstein presented a report that was crafted to predict a "point of equal opportunity" that has little

relevance to the retrogression inquiry mandated by Section 5. Plaintiff's retrogression analysis consisted of a simple comparison of the number of majority-minority districts, and the number of districts with "equal" chances of electing an African American preferred candidate. Defendants' expert was only marginally more helpful. Engstrom provided a report that presented no conclusions with respect to the existence of retrogression in the Senate plan. Finally, intervenors' expert offered no substantive evidence at all.

In short, the evidence presented by the parties, while voluminous, may be relied upon only for several limited conclusions. The number of Senate Districts with majorities of BVAP would, according to Georgia's calculations, increase from twelve to thirteen; according to the Attorney General's interpretation of the census data, the number would decrease from twelve to eleven. According to Georgia, the proposed Senate Districts 2, 12 and 26 would have

BVAPs of 50.31%, 50.22% and 50.39% respectively; the Attorney General's calculations of BVAPs are slightly less, with Senate District 2 falling below 50% to 49.81% BVAP. Under the proposed Senate plan, the number of Senate Districts with majorities of Black registered voters will decrease from 11 to 8 districts.

Plaintiff's expert predicts that, as BVAP in a district decreases, the probability that an African American candidate of choice will be elected diminishes. The percentages of BVAP in 11 of 12 of the existing majority-minority districts will decrease by 2.42%-26.28% in the redrawn districts. In senate Districts 2, 12 and 26, it will decrease by 10.27%, 4.77% and 11.65% respectively.

An analysis of local and regional elections demonstrates the presence of racially polarized voting in the benchmark Senate Districts and in several of the counties and cities included in the benchmark Senate Districts. Substantial

portions of these jurisdictions fall within the proposed Senate Districts. Lay witness testimony also suggests the presence of racially polarized voting, especially in Senate Districts 2 and 12. There is, however, conflicting lay testimony regarding the probability that the redrawn Senate Districts will permit African American candidates of choice to win election.

Reaggregated results from statewide elections show that African American candidates may garner sufficient white crossover votes to win election in the proposed Senate Districts 2, 12 and 26. However, the record also supports a finding that African American candidates of choice of running for State Senate seats are unlikely to receive the same levels of White crossover voting as may occur in statewide elections.

Finally, the decline in BVAPs in Senate Districts 2, 12 and 26 was not required by the State's constitutional obligation to draw districts that comply with the

principle of one person-one vote. Under the reapportionment plan, predominantly African American precincts are removed from the under populated Senate Districts 2, 12 and 26. Although the plan proposed to add African American population to these districts, the total result is a decrease in the districts' BVAP. The State has offered no evidence to suggest that this decrease was inevitable or necessary.

In light of these conclusions, the court finds that the State has failed to demonstrate by a Preponderance of evidence that the Reapportionment plan for the State Senate will not have a retrogressive effect. The court simply is not persuaded, on the basis of the evidence before it, that minority voting strength will not be significantly diminished by the proposed redistricting. The plan proposes to decrease the BVAPs in existing majority-minorities, or slightly less than majorities. It was Georgia's burden to produce some evidence to prove that these

changes would not be retrogressive.

The State has produced no evidence to demonstrate that the demographics of the proposed Senate Districts counteract any reduction in BVAP. It has not attempted to show the number of White voters who cross over to vote for African American candidates of choice in the disputed districts and how that might affect the effective exercise of minority voters' franchise. Nor has the State presented evidence regarding potential gains in minority voting strength in Senate Districts other than Districts 2, 12 and 26. There are, without doubt, numerous other ways, given the limited evidence of racially polarized voting in State Senate and local elections, that Georgia could have met its burden of proof in this case, Yet, the court is limited to reviewing the evidence presented by the parties and is compelled to hold that the State has not met its burden. Accordingly, we are unable to conclude that the Senate reapportionment plan will not have a retrogressive effect on voting

strength of Georgia's African American electorate.

2. United States Congressional Plan

Although Georgia has three African American representatives in the United State Congress, there is currently only one majority-minority Congressional district, the Fifth Congressional District. The proposed redistricting plan would include two majority-minority congressional districts. Plaintiff argues that the plan also creates addition districts where African Americans have the opportunity for election, by increasing BVAPs in several districts.

Intervenors assert that the Congressional redistricting plan violates Section 5. First, they argue that the Congressional plan does not create two majority-minority districts. Rather, when African American *population* is counted in accordance with the Attorney General's Guidance, only the Fifth District remains a majority-minority district. However, the

Fifth District has a majority BVAP. The court is not persuaded that the reduction in the African American population in the Fifth District necessarily constitutes retrogression.

Second, interveners contend that the proposed Congressional plan retrogresses because of the reduction in the Fifth District's BVAP, and due to purported racially polarized voting in one 1998 election for Fulton County Commission and one 2001 runoff for Atlanta City Council president. There is, however, no evidence in the record to support these assertions.

Finally, intervenors suggest that the presence of alternative plans proves the existence of retrogression. The fact that some of intervenors' plans result in higher percentages of BVAP in certain districts (and lower percentages in others) does not establish that Georgia's proposed Congressional plan retrogresses. Intervenors' evidence, at best, shows that the General Assembly could have adopted a

more Republican plan. The evidence in the record establishes by a preponderance of the evidence that the Congressional redistricting plan does not result in retrogression in the position of African Americans with respect to the effective exercise of the electoral franchise.

3. State House Plan

According to the 2000 census data, the benchmark State House plan contains 40 districts with a total Black population over 50%, 37 districts with total BVAP over 50%, and 38 districts with total Black voting registration over 50%.

The proposed plan would have 38 or 39 seats in districts with majorities of BVAP. While some of the existing House districts would experience decreases in BVAP under the proposed plan, there is no evidence before the court of racially polarized voting in any House Districts that might suggest that these decreases will have a retrogressive effect.

Intervenors argue that the House Plan is infirm because it contains multi-member

districts. They suggest that courts have generally disfavored majority-minority districts because such districts have the potential to "submerge" substantial minority populations, making it difficult for minorities to select candidates of choice. However, of the multi-member districts in the proposed plan, six are majority-minority districts with BVAPs ranging from 54.14% to 65.18%. The other multi-member districts have relatively low levels of BVAP, ranging from 0.58% to 33.52%. Plaintiff asserts that African American voters will maintain voting strength in the majority-minority multi-member districts, as they will have the opportunity to elect candidates to each of the seats. Intervenors present no evidence or arguments that would convince the court that the multi-member districts will diminish minority-voting strength.

The proposed State House redistricting plan would create two additional seats in majority-minority districts. The court is persuaded that the House-redistricting plan

will not have a retrogressive effect on minority voting strength.

D. Purpose of the Reapportionment Plans

The State argues that all three redistricting plans were drawn with the intent to maintain and bolster the Democratic control of the State House and Senate. In order to reach these goals, Democratic legislators sought to "unpack" majority Black districts, and to increase Democratic voting strength throughout the State. The testimony of State Democratic legislators reflects a belief that African American votes, which generally heavily favor Democrats, are "wasted" in districts with high percentages of African American voters. *See*, e.g., Pls.' Resp. to USPFF ¶ 344 ("Increasing the BVAP in Senate District 12 would waste Black voters and diminish their impact in other districts and the reapportionment plan of the State as a whole."); Pl. Ex. 22 at 21 (Meggers). The plans also reflect an effort to prevent Democratic incumbents from being placed in the same districts.

In Bossier II, the Supreme Court held that "¶ 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but no retrogressive purpose." 528 U.S. 320, 341. The court held that its "longstanding interpretation" of the effect prong as limited to a concern with retrogression applied to the "purpose" prong of section 5, which must cover "only retrogressive dilution" *Id.* at 327. In a Section 5 action, therefore, the government "need only refute the covered jurisdiction's prima facie showing that a proposed voting change does not have a retrogressive purpose in order for preclearance to be denied." *Id.* at 332.

Georgia has the burden of making a *prima facie* showing the plans do not have a retrogressive purpose. *Id.* The blatantly partisan nature of the redistricting process and the goals of the authors of the redistricting plans do not violate Section 5. An intent to help the Democratic Party is not a retrogressive purpose, or an intent to decrease minority voting strength. *Id.*

Here, the State's plans undoubtedly spread out Georgia's African American voter. Plaintiff however, contends, and no one has disputed, that this was done not to purposefully decrease minority voting strength, but instead to increase the electoral opportunities of Georgia's Democratic Party. Those individuals involved in the redistricting process testified at length regarding their intent to bolster the Democratic Party's majority in the Georgia General Assembly. *See*, e.g., Pl. Ex. 20 at 23-24. We see no legal infirmity in this effort. Just as partisan progression is no guarantor of Section 5 compliance, neighed is it proscribe. Moreover, this court's previous analysis makes clear that dilution of minority voting blocs does not always constitute retrogression. Here, in the end, there is simply no evidence that plaintiff intended to diminish the opportunities of minority bothers to elect candidates of their choice. As such, the court concludes that neither Georgia's United States Congressional

redistricting plan nor its state House plan was enacted with an impermissible retrogressive purpose. While the same record evidence would support a finding that the State Senate plan does not have a retrogressive purpose, we need not reach this issue as we hold that the Senate plan has a retrogressive effect.

IV. CONCLUSION

Accordingly, having considered the entire record herein and the relevant statutory and case law, it is hereby

ORDERED that the American Civil Liberties Union's motion for leave to participate as amices curiae (108-1) is DENIED; and it is

FURTHER ORDERED plaintiff's motion to vacate the court's grant of intervention (92-1) is DENIED; and intervenors' motions to strike portions of Epstein's t testimony (149) (150) are DENIED.

This court is divested of jurisdiction to consider Michael King's motion for a stay of proceedings [145] and renewed motion to intervene [144].

For the foregoing reasons, the court holds that the State of Georgia has not demonstrated by a preponderance of the evidence that the State Senate redistricting plan would not have a retrogressive effect on African American voters' opportunities to exercise their electoral power at the polls. Accordingly, the court DENIES plaintiff's request to enter a declaratory judgment that Act No. 1EX6 does not have the purpose or effect of denying to abridging the right to vote on account of race or color.

The State of Georgia has demonstrated by preponderance to the evidence that the Congressional redistricting plan does not have the purpose or effect of denying or abridging the right to vote on account of race or color. Accordingly, a declaratory judgment is GRANTED that Act No. 2EX11 does not violate Section 5 of the Voting Rights Act.

The State of Georgia has demonstrated by a preponderance of the evidence that the State House redistricting plan does not have the purpose or effect of denying or abridging the right to vote on account of race or color. Accordingly, a declaratory judgment is GRANTED that Act No. 2EX23 does not violate Section 5 of the Voting Rights Act.

An appropriate Judgment accompanies this Opinion and Order.

4/5/02
Date

Signed
EMMET G. SULLIVAN
UNITED STATES
DISTRICT JUDGE

4/5/02
Date

Signed
HARRY T. EDWARDS
UNITED STATES
CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.01-2111 (EGS HTE LFO)
[44] [55] [89] [98] [99] [100]
THREE-JUDGE COURT

Filed Jan 30 2001

THE STATE OF GEORGIA

Plaintiff,

v.

John Ashcroft, *et al.*,

Defendants.

Before EDWARDS, Circuit Judge, SULLIVAN, District Judge, and OBERDORFER, Senior District Judge.

ORDER

Pursuant to the January 25. 2002 pretrial conference, and the relevant statutory and case laws, it is hereby ORDERED that Michael King's motion to intervene [55] is DENIED

without prejudice due to his failure to appear at the January 25, 2002 pretrial conference, of which he had notice, his consistent failure to communicate with Chambers and with counsel for the parties in this matter, and the expedited nature of these proceedings; and it is

FURTHER ORDERED that Frank B. Strickland's motion to appear *pro hac vice* on behalf of defendants-defendants [98] is GRANTED; and it is

FURTHER ORDERED that Anne W. Lewis' motion to appear pro *hac vice* on behalf of defendants-defendants [100] GRANTED; and it is

FURTHER ORDERED that plaintiff's motion for reconsideration of this court's January 4, 2002 Order, and renewed motion to compel immediate compliance with the Court's initial scheduling and pretrial order [44] is DENIED as moot; and it is

FURTHER ORDERED that plaintiff's motion *in limine* to simplify presentation of evidence regarding census data [89] is

DENIED for substantially the reasons articulated in defendants' opposition to the motion; and it is

FURTHER ORDERED that defendants' motion to compel deposition testimony [99] is GRANTED; and it is

FURTHER ORDERED that the commencement of trial is rescheduled from February 1, 2002 at 10:00 a.m. to February 4, 2002 at 10:00a.m.in Courtroom One.

IT IS SO ORDERED FOR THE THREE-JUDGE COURT.

1/29/02
Date

SIGNED
EMMET G. SULLIVAN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.01-2111 (EGS)
THREE-JUDGE COURT

Filed Dec 21 2001

THE STATE OF GEORGIA

Plaintiff,

v.

John Ashcroft, *et al.*,

Defendants.

Before EDWARDS, Circuit Judge, SULLIVAN, and OBERDORFER, District Judges.

ORDER

Upon consideration of the motion for leave to intervene filed by Michael B. King, and the relevant statutory and case law, and

pursuant to 28 U.S.C. § 2284 (b) (3), it is hereby ORDERED that the motion for leave to intervene is DENIED without prejudice subject to reconsideration at such time as the United States has identified its legal position regarding plaintiff's complaint. The Court finds that movant is not presently able to demonstrate that his interests are not adequately represented by the existing parties, as required by Fed. R. Civ. P. 24 (a) (2). However, movant is hereby GRANTED permission to file *amicus curiae* brief addressing relevant issues by no later than January 14, 2002; any and all responses to the *amicus curiae* brief shall be filed by no later than January 16, 2002; and any reply shall be filed by no later than January 18, 2002.

IT IS SO ORDERED FOR THE COURT.

12/21/01
Date

SIGNED
EMMET G. SULLIVAN
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NO. 1:01CV2111

Filed Oct. 10, 2001

THE STATE OF GEORGIA,
State Law Department
132 State Judicial
Building, 40 Capitol
Square, SW, Atlanta,
GA 30334-1300

Plaintiff,

Versus

JOHN ASHCROFT, in his
official capacity as
Attorney General of the
United States: RALPH F.
BOYD, JR., in his official
capacity as Assistant
Attorney General of the
United States; and the
UNITED STATES OF AMERICA,

Defendants,

and

MICHAEL B. KING,

Applicant for Intervention.

MICHAEL B. KING'S NOTICE OF APPEAL

Notice is hereby given that Michael B. King, applicant for intervention, hereby appeals to the United Stats Supreme Court from the Order denying his Renewed Motion to Intervene, entered on January 30, 2002.

The clerk shall transmit the entire case record to the Clerk of the United States Supreme Court.

The clerk shall additionally include only the transcript of the January 25, 2002 pre-trial conference.

This 5th day of January, 2002.

SIGNED

MICHAEL B. KING 421140
Attorney Pro Se

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of Michael B. King's Notice of Appeal, Motion to Stay Hearing and Motion for Reconsideration and Alternatively Second Renewed Motion To Intervene upon the interested parties by first class mail addressed to:

Joseph Rich, Esq.
U.S. Justice Department
Room 7254
1800 G Street NW
Washington, D.C. 20035-6128

Stuart Pierson, Esq.
Troutman Sanders
Suite 500 East
401 Ninth Street, NW
Washington, D.C. 20004-2134

This 5th day of February, 2002.

SIGNED
MICHAEL B.KING 421140
Attorney Pro Se

116 South Main St.
Suite 9
Jonesboro, Ga. 30236
(770) 478-3555
Fax : (770) 477-7068

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CASE NO. 1:01CV2111

Received Apr. 17, 2002

THE STATE OF GEORGIA,

Plaintiff,

Versus

JOHN ASHCROFT, et al.,

Defendants,

and

MICHAEL B. KING,

Applicant for Intervention

MICHAEL B. KING'S SECOND NOTICE OF APPEAL

Notice is hereby given that Michael B. King, applicant for intervention, hereby appeals to the United States Supreme Court from the final judgment in the above-styled case, entered on April 5, 2002.

The clerk shall transmit the entire case record to the Clerk of the United States Supreme Court.

The clerk shall additionally include only the transcripts of the January 25, 2002 pretrial conference and the evidentiary hearing proceedings, beginning on February 4, 2002.

This 10th day of April, 2002.

SIGNED

MICHAEL B. KING 421140
Attorney Pro Se

116 S. Main St.
Suite 9
Jonesboro, GA 30236
(770) 476-3555

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a copy of Michael B. King's Second Notice of Appeal upon the interested parties by first class mail addressed to:

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Frank B. Strickland, Esq.
Strickland Brockington Lewis, LLP
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117 Peachtree Street, NE
Atlanta, GA 30309

Gregory T. Nojeim, Esq.
ACLU
2725 Harris Tower
233 Peachtree Street, NE
Atlanta, GA 30303

This 10th day of April, 2002.

SIGNED
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